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Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 45.

BENJAMIN HAYDEN, APPELLANT,
vs.
CHARLES MANNING, APPELLEE.

BRIEF AND ARGUMENT ON PART OF APPELLANT.

Appeal from the Circuit Court of the United States for the District of Oregon.

JOHN H. MITCHELL,
Of Counsel for Appellant.

Judd & Detweiler, Printers.

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Appeal from the Circuit Court of the United States for the District of Oregon.

STATEMENT OF THE CASE.

This suit is brought by the plaintiff, a citizen of California, against the defendant, a citizen of Oregon, to compel a conveyance of certain lands in Polk county, Oregon, containing 319 acres, and known as the south half of the Bethuel and Rachel Dove Donation land claim.

The premises in controversy were the property of Rachel Dove, wife of Bethuel Dove, being her half of a donation claim taken by Bethuel under the act of Congress of September 27th, 1850, commonly known as the Oregon donation law.

March 2d, 1859, Bethuel Dove borrowed $1,550 from the county of Polk, and on the same date he and his wife, Rachel Dove, executed a mortgage of the premises in question to secure the payment of such loan. The money thus borrowed was used in part payment of a debt which Bethuel Dove was then owing one Wm. C. Griswold.

October 23d, 1863, suit was brought in the State circuit court for the county of Polk, by J. Emmons, then county treasurer, to foreclose this mortgage.

Record, 127.

The same month, October, 1863, Benjamin Hayden, the appellant in this suit, at the solicitation of Bethuel Dove, appeared in the State court in the case of Emmons, treasurer, *vs.* Bethuel and Rachel Dove, and filed a demurrer to the complaint. The demurrer commenced as follows:

"Now comes the above-named defendant, by B. Hayden, *his* attorney."

And it was signed as follows:

"B. Hayden,
"*Atty. for Def't.*"

Record, 129.

November 18th, 1863, this demurrer was overruled, and the defendants, Bethuel and Rachel Dove, not wishing to contest further, having no defence on the merits, a decree was entered against defendants for the sum of $2,050.73, legal tender currency, and the mortgaged premises were ordered sold.

Record, 130.

March 5th, 1864, the mortgaged premises were, after the sale had been postponed by the sheriff twice for want of bidders, sold at public auction to the highest bidder, and was purchased by the defendant and appellant in this suit, Benjamin Hayden, or rather by a person for him—as he could not, by reason of another engagement, attend the sale—for the sum of $1,225. And on the 26th of April next following, the sale having been duly confirmed by the court, J. M. Butler, sheriff of Polk county, executed and delivered to Hayden his deed for the premises. And the same was duly filed and recorded in the record of deeds of Polk county on the 27th day of May, 1864.

Record, 13.

October 1st, 1865, Hayden entered into possession of the premises in dispute under his sheriff's deed—the Doves surrendering possession peaceably and without protest, and removing to another farm, and has ever since been in the possession thereof; and from the date of his purchase, March 5th, 1864, until the spring of 1874, a period of over ten years, neither Rachel nor Bethuel Dove, nor any other person, so far as disclosed by the testimony in this suit, ever questioned Hayden's right to the property; and during which time Hayden had, with the full knowledge of the Doves, expended over $1,500 in improving the property.

September 28th, 1874, Rachel Dove commenced a suit in the circuit court of the State of Oregon, for the county of Polk, against Hayden, in which she sought to recover the land in controversy by charging Hayden as a trustee *ex maleficio;* basing her claim in *that* suit, as Manning, the new complainant, does in *this* suit, briefly on two grounds, as follows:

1st. That Hayden was, at the date of his purchase at the sheriff's sale, the attorney of Rachel Dove, and that as such, by purchasing in his own name, he became the trustee of the mortgagor, *ex maleficio;* and

2d. That there was an agreement between Hayden and Rachel Dove, whereby Hayden had agreed to buy in the property for her use and benefit. (Record 124.)

To this suit Hayden appeared and made answer, denying, county of Polk, and on the same date he and his wife, Rachel Dove, executed a mortgage of the premises in question to secure the payment of such loan. The money thus borrowed was used in part payment of a debt which Bethuel Dove was then owing one Wm. C. Griswold.

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1st. That Hayden was, at the date of his purchase at the sheriff's sale, the attorney of Rachel Dove, and that as such, by purchasing in his own name, he became the trustee of the mortgagor, *ex maleficio;* and

2d. That there was an agreement between Hayden and Rachel Dove, whereby Hayden had agreed to buy in the property for her use and benefit. (Record 124.)

To this suit Hayden appeared and made answer, denying, as he does, unqualifiedly, in this suit, both the assumptions of fact above stated, (Record 116.) After issues of fact were fully joined, and before trial, Rachel Dove, through her attorneys, dismissed this suit. This was done against the protest of Hayden's attorneys, who, claiming she had no such right, in view of the character of the answer filed, took the case to the supreme court of the State on error, and it was there determined by the supreme court in December, 1875, in favor of the right of the plaintiffs to dismiss the case. (Record 94.)

On April 7th, 1875, eight months before the foregoing suit was determined in the supreme court, and for aught that appears in this case, before the date of the dismissal in the circuit court, (the date of such dismissal does not appear in the record,) Rachel Dove and Bethuel Dove made a deed of the premises in dispute to Charles Manning, the appellee, he being their son-in-law, and a citizen of the State of California, (Record, 113.) Although the deed recites a consideration of $5,000 for land, the legal title and possession of which were in Hayden, and in reference to which, a suit was then pending in the State court, the fact is, as clearly shown by the testimony of both the Doves and Manning's wife, not one cent was ever paid by Manning, or secured to be paid, or promised to be paid. The sale was wholly without consideration, the sole purpose being, as the record clearly shows, to create a case cognizable in the United States court, (Record, 17–60.)

The complaint in this suit, (Record, p. 4,) discloses the fact that it was sworn to on the 13th day of September, 1875, *three* months before the case of Rachel Dove was finally determined by the State supreme court; nor was it verified by Charles Manning, the complainant nominally, but by *Bethuel Dove*, as "*agent and attorney-in-fact of Manning*," (Record, p. 4.) This complaint, however, was not filed in the United States circuit court until May 12, 1876, precisely eight months after it was verified.

The bill in this suit is substantially the same in the body, in substance, and effect, as that filed by Rachel Dove in the State court.

To this bill the appellant, Hayden, filed demurrer, which was overruled by the court (Record 7), and the opinion of the court overruling the demurrer concludes as follows:

> "The demurrer is overruled, with leave to the defendant to answer. It is also to be understood that this opinion is expressed subject to correction on the final hearing, when the questions argued upon this demurrer may be considered in the light of all the pleadings and proofs in the case." (Record, p. 11.)

The defendant, Hayden, then filed answer, denying specifically, in a clear, frank, and positive manner, and without evasion or indirection, all the material allegations in the bill; and among other things, the allegation *that the complainant, Manning, is the lawful owner in good faith of the premises, or that said Rachael Dove had ever, for a valuable or any consideration whatever, granted, or bargained, or conveyed her interest in said lands to Manning.* It raises the question of the collusive character of the transfer to Manning, and of Manning's lack of real ownership, in the most direct and positive manner. (Record, p. 15.)

The findings of the court below, both as to the question of jurisdiction depending on the *bona fides* or collusive character of the transfer to Manning, and on the merits, were adverse to Hayden, (Record, p. 23,) and the case is now here on appeal from the findings and decree of the court below.

The foregoing is a fair statement of the undisputed facts connected with the history of this controversy; the controverted points will become apparent from the following

Assignment of Errors.

1st. The circuit court erred in overruling appellant's demurrer to the bill of complainant.

2d. The court erred in finding, under the issues and evidence, that Rachel Dove had, for a valuable consideration, in good faith conveyed the premises in dispute to complainant Manning, and that he was the owner in good faith of the same, or had any right to maintain this suit.

3d. The court erred in not peremptorily—after the evidence was in—dismissing complainant's bill, on the ground that it appeared conclusively from such testimony that the party plaintiff was improperly and collusively made for the purpose of creating a case cognizable in the United States court, and that the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of said court.

4th. The court erred in finding that Hayden was at the date of his purchase of the premises in dispute at sheriff's sale the attorney and confidential advisor of Rachel and Bethuel Dove, or either of them.

5th. The court erred in finding that there was any understanding, express or implied, between Hayden and the Doves, or either of them, that he should bid in the property at the sheriff's sale for the benefit of Rachael Dove.

6th. The court erred in finding that Hayden was ever at any time the attorney or confidential advisor of Rachel Dove.

7th. The court erred in finding that Hayden wrote the mortgage executed by Rachel Dove and Bethuel Dove to the treasurer of Polk county.

8th. The court erred in holding that Hayden was the trustee *ex maleficio* of the lands in question for the benefit of either Rachel Dove or her assignee.

9th. The court erred in decreeing that Hayden should convey the premises in dispute to complainant Manning.

10th. The court erred in not dismissing complainant's bill for want of equity, both in the bill itself and on the evidence.

In addition to the authorities cited in appellant's brief, heretofore filed, and in further support of the positions therein assumed, the following is respectfully submitted:

JURISDICTION.

The question of jurisdiction is discussed in former brief, pages 82–93, inclusive.

In addition to the *form* in which this question of jurisdiction is raised by the pleadings, evidence, and former brief, appellant begs to submit a motion direct for dismissal, which motion is as follows, and has been duly filed in this court:

> "Now comes the appellant by his counsel, and moves the Court for an order and decree reversing this suit and remanding it to the court below with instructions to dismiss complainant's bill, for the reason:
>
> "1st. Because it clearly appears from the pleadings and evidence in this case that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court or this Court. And for the reason that the party-plaintiff has been improperly and collusively made; and for the purpose of creating a case cognizable in the United States circuit court."

This motion is not deemed essential, but is submitted out of abundant caution that the question may be directly presented in this form.

In addition to the case of Williams *vs.* the Township of Nottawa, 14 Otto, Oct. Term, 1881, the attention of the court is attracted to that of Hawes *vs.* Oakland, 14 Otto, in which this Court—opinion by Mr. Justice Miller—gave expression to its views as to the meaning and intent of the fifth section of the judiciary act of March 3, 1875—

Mr. Justice Miller said:

> "And this statute while enlarging the jurisdiction of the circuit courts in cases fairly within the constitutional grant of power to the Federal judiciary, strikes a blow by its fifth section at improper and collusive attempts to impose upon those courts the cognizance of cases not justly belonging to them."

The court after quoting the section, at length, and further commenting on it, concludes as follows:

> "It is believed that a rigid enforcement of this statute by the circuit courts would relieve them of many cases which have no proper place on their dockets."

The counsel for Manning seek in their brief to raise the question that this point of the collusive transfer was not raised or decided in the court below, and that, therefore, cannot now be raised here.

The assumption that this qnestion was not raised or passed upon in the court below is, as has already been fully shown, (see former brief, pages 82–93, inclusive,) entirely erroneous.

But, conceding for the argument, that the question had not been raised in the court below, it is respectfully submitted that the general rule, which has frequently been asserted by this Court to the effect that nothing which occurred in the progress of the trial below can be assigned for error here which was not brought to the attention of the court and decided by it, does not apply to questions involving the jurisdiction of the court; and that whenever it appears in the progress of any suit, either in the circuit or the Supreme Court, that the case does not come within the provisions of the acts of Congress giving those courts jurisdiction, and through which alone they can exercise jurisdiction, it is the duty of the court to dismiss the case, whether such duty is imposed by direct terms of the statute or not.

For instance, the 16th section of the Judiciary Act of 1879, provides: "That suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law."

And yet it has frequently been held by this court that this question of jurisdiction may be enforced by the court, though not raised by the pleadings nor suggested by counsel.

In Oelrichs *vs.* Spain, 15 Wall., 211, this Court said:

> "In the jurisprudence of the United States the objection that there is an adequate remedy at law raises a jurisdictional question and may be enforced by the court *sua sponte*, though not raised by the pleadings, nor suggested by counsel."

It is submitted that the clause in the judiciary act which ousts a United States court of equity jurisdiction in a case where it appears there is plain, adequate, and complete remedy at law, no more raises a jurisdictional question than does the clause in that same judiciary act which deprives a United States circuit court of jurisdiction in all cases where either plaintiff or defendant has been collusively made or joined—as in this case—for the purpose of creating a case cognizable in a Federal court.

And, if in the former case, the jurisdiction should, without suggestion of counsel, be by the court on its own motion transferred from the equity to the law side of the court, *a fortiori* may it be contended that in the latter, the parties should be peremptorily remanded to the State tribunal. Otherwise, if through either the ignorance, negligence, or collusion of counsel, the question is not raised, the court would be compelled to proceed with the hearing of a case clearly not properly within its jurisdiction, and imposed upon it by the most bare-faced collusion and transparent fraud.

What will Constitute a Purchaser at Sheriff's Sale—a Trustee ex maleficio.

The fraud which will convert the purchaser at a sheriff's sale into a trustee *ex maleficio* of the debtor, must have been fraud *at the time of the sale.* Subsequent crime will not answer any more than subsequent payment of the purchase money will convert an absolute purchase into a naked trust.

Kellum *vs.* Smith, 33 Penn. St. Rep., 158.

The court (Judge Strong,) in the above case, further says:

> "Where the purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his engagement, the fraud, if any, is not *at the sale*—not in the promise—but in its subsequent breach. *That is too late.* It is absolutely settled equity will not decree such a purchaser to be a trustee unless there is more than the mere violation of a mere parol agreement. * * *
>
> "It may be, that if at the instance of the promisor the promisee is induced to incur some expense, or perform some act which he otherwise would not have done, the former shall be estopped from denying the trust. But, however this may be, *mere acquiescence, or omission to take other steps to obtain the property, though induced by faith* in the promisor, is not available for such a purpose."

Id., page 158.

The precise point decided in this case was that a promise to purchase real estate at a sheriff's sale and to convey it to the defendant in the execution whenever he should repay to the purchasers their advances to him, does *not* raise a resulting trust in favor of the defendant.

While in Wheeler *vs.* Reynolds, 66 New York Rep., page 236, the court, after quoting the above from Kellum *vs.* Smith, approvingly says:

> "If, in the case under consideration, the defendant *at the sale* had declared that he was bidding on the property for

the plaintiff, and had thus induced other persons to refrain from bidding, and purchased the property for less than its value, a case would probably have been made for holding him as trustee *ex maleficio* of the plaintiff."

Again, in Faust *vs.* Hass, 73 Penn. State Rep., (1873,) page 301—the court, Mr. Justice Sharswood, says:

> " It is certainly true, that if a man buys at sheriff's sale or otherwise, and pays his own money for the purchase, no verbal agreement *before* or *afterwards* to hold for another will make him a trustee. Fox *vs.* Heffner, 1 W. & S., 372; Jackman *vs.* Ringherd, 4 Id., 149; Barret *vs.* Dougherty, 8 Casey, 371. But where artifice and trick are resorted to in order to procure the property at an under value, as for example, by deterring bidders at a sheriff's sale, or in any other way, the rule is different."

In the case at bar, considering for the moment that branch of the case wherein it is claimed that complainant has rights growing out of the alleged agreement of Hayden to purchase the property for the benefit of Mrs. Dove, it is not contended even by the complainant in his complaint or by *any evidence* that there was any *artifice* or *trick* employed upon the part of Hayden in order to procure the property at an under value, such as *stating* to bidders either *at the sale* or *before* the sale that he intended to purchase for Mrs. Dove's benefit; or that he did any act or thing to depreciate the value, or prevent bidders from attending, or that the price for which the property sold was less by any sum by reason of any word or act of Hayden than it otherwise would or might have been. On the contrary, the only claim made in this connection is—and this is emphatically denied by Hayden—that he, Hayden, had, on the day of the sale, sent word to Mrs. Dove to the effect that he had left a man to bid off the property for her; and this word, according to the testimony of complainant's own witnesses, the son of Mrs. Dove and the wife of Manning, who is the daughter of the Doves, was not delivered to Mrs. Dove until after the sale had actually taken place.

Record, p. 43, 44, 54, 55, 61, 65.

See former brief of appellant, pages 39 to 64 inclusive, where the whole question is fully presented.

Was Hayden the attorney of Rachel Dove at the date of his purchase at sheriff's sale, March 5th, 1864 ?

It is respectfully insisted that he was not. And, in addition to the suggestions on this subject contained in former brief for appellant, (pages 65 to 72, inclusive,) attention of the court and opposing counsel is attracted to the following considerations :

It is argued by the court below, and doubtless will be contended here, that because Hayden, at the request of Bethuel Dove, appeared in the case of Emmons, treasurer, *vs.* Rachel and Bethuel Dove, in the foreclosure suit, and in November, 1863, filed a demurrer on his behalf to the complaint, that therefore he was *ipso facto* the attorney of both Rachel and Bethuel Dove four months afterward, and nearly four months after decree of foreclosure had been rendered. As bearing upon this question, it is submitted :

I.

At common law, the authority of an attorney to represent his client in an action ceased upon the entry of judgment ; but for a year and a day thereafter he had authority to act for his client in enforcing the judgment by execution.

Com. Dig., Att'y B., 10.
2 Inst., 378.
1 Tidd Pr., 93.
Weeks on Attorneys-at-Law, page 426, sec. 249.

II.

By statutes of different States, the relation of the attorney to the plaintiff in the judgment is continued in some a longer and others a shorter period after judgment, authorizing him to issue execution, collect the judgment, enter satisfaction, &c.

III.

But neither the common law nor the statute of any State, so far as I have been able to examine, *continues after judgment the authority of the attorney of the defeated party, the judgment debtor, or*, as stated by the supreme court of the State of Minnesota, in the case of Berthold *vs.* Fox, 21 Minnesota, 53, "*the defendant in the judgment, as he is aptly styled.*"

It is a rule sustained by numerous authorities that the authority of the attorney ceases with the termination of the suit *and the entering of judgment;* and it is equally true that, in the absence of special circumstances, the authority continues by virtue of the original retainer until the final termination of the cause. (Weeks on Attorneys-at-Law, page 424; Berthold *vs.* Fox, 21 Minn., 51; Kronschoble *vs.* Knoblauch, 21 Minn., 56; Jackson *vs.* Bartlett, 8 Johns., 361; Eagen *vs.* Rooney, 38 How., Pa. Rep., 121.)

It is well settled, and it follows as a consequence of, and is, a verification of the doctrine that the relation ceases with the determination of the cause; that a party may sue out a writ of execution—*scire facias*—or error by a different attorney without giving notice of the change. (Weeks on Attorneys-at-Law, page 424; Thorp *vs.* Fowler, 5 Cowen, 446; McLaren *vs.* Charrier, 5 Paige, 530; Adams *vs.* Burk, 23 How., Pa. Rep., 45; Hinkley *vs.* St. Anthony Falls, 9 Minn., 55.)

The Oregon code in no manner changes the rule of the common law that the authority of the attorney for the *defeated party*, the *judgment debtor*, or, in other words, the *defendant in the judgment* terminates with the entry of decree or judgment; that the relation of attorney and client is then at at end.

The Oregon code, under the head of " Rights and Duties of Attorneys," (sec. 1007, page 308,) provides as follows :

"An attorney has authority—

" 1. To bind his client, in any of the proceedings in an action, suit, or proceeding, by his agreement filed with the clerk or entered upon the journal of the court, and not otherwise.

" 2. To receive money or property claimed by his client in an action, suit, or proceeding, during the pendency thereof, *or within three years after* judgment or decree, and upon the payment and delivery thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment or decree."

" But this section does not prevent a party from employing a new attorney to issue *scire* upon a judgment or decree, or to take the other proceedings prescribed by this code for its enforcement, and when he does so, the authority of the former attorney ceases."

It follows from these authorities, and the authorities and arguments presented in first brief filed on part of appellant, that Hayden, in the absence of any special contract to the contrary, and there was none, ceased to be the attorney of the Doves in the foreclosure suit on the entry of judgment and decree therein; and the mere fact that he had appeared and filed a demurrer to the complaint in that suit did not of itself prevent him from becoming the purchaser in his own name and right at the sheriff's sale, nor does the testimony show that he was the general attorney or confidential adviser of the Doves or either of them.

Respectfully submitted as supplemental to brief heretofore filed on part of appellant.

John H. Mitchell,
Of Counsel for Appellant.

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STATEMENT.

This was a suit by Charles Manning, the appellee, against Benjamin Hayden, the appellant, to decree the said Hayden a trustee of the legal title to certain real property situated in the county of Polk and State of Oregon. The bill was filed May 12th, 1876. It is alleged in the bill, in substance, that Bethuel Dove and Rachel Dove, his wife, on or about the 1st day of

December, 1848, settled upon a part of the public domain in Oregon, by virtue of which, and a subsequent compliance with the act of Congress on the 27th day of September, 1850, they secured a donation claim under that act, the one-half thereof inuring to the said Rachael Dove and which is the real property in controversy. That on the 2nd of March, 1859, after said Dove and wife had completed their residence and cultivation so as to entitle them to a patent to said claim, he became indebted in a large sum of money, and that in order to liquidate it, he borrowed money from the school fund, to secure which, he and the said Rachel executed a mortgage upon her portion of the said claim, the property in question. It is also alleged in the bill, that the appellant, who was an attorney-at-law, was the legal adviser of the said Rachel in regard to the said mortgage to the school fund, and that he induced her to give the mortgage by assuring her that she would be in no danger of losing her property, that he would mortgage his property before she should lose hers, and that such assurance was given to allure her into security for the purpose of enabling him to cheat and defraud her out of her claim. That after the maturity of the debt to the school fund and on or about the 23d day of October, 1863, a suit was instituted to foreclose the said mortgage. That thereupon said Bethuel and Rachel retained the said appellant as their attorney and counsel therein, that he interposed a defense in their behalf, and that on the 18th day of November, 1863, a decree was recovered therein for the sale of said property to satisfy the said debt; that an execution was issued upon the said decree, and the said property offered for sale at public auction. That prior to the time of such sale said appellant called at her house and left a verbal message for her, which was delivered in due time, to the effect that he would make all necessary arrangements to bid off said property for her benefit, and would protect her rights therein; that in consequence of the said message, and relying upon the integrity of the appellant, she did not attend the sale, nor take any steps to secure her interest in said property; that the said property at the time was worth four thousand dollars, gold coin; that appellant attended the sale and bid in the property in his own name, at the sum of twelve hundred and twenty-five dollars in

United States legal tender treasury notes, worth only at the time, fifty cents upon the dollar of gold coin.

That after the appellant bid off the property, he represented that it had been bid off in her name and for her benefit, and that the amount of money necessary for her to pay to redeem it was six hundred and twelve dollars and fifty cents gold coin.

That relying upon such representation and the integrity of appellant, she, on or abont July 1864, paid appellant on account of his said bid, to be applied upon the agreed sum of $612.50, as a part payment thereof, the sum of two hundred dollars gold coin, which appellant received, and agreed to apply in that way.

That appellant afterwards, on or about August, 1865, surreptitiously obtained possession of said property, and ever since had been in receipt of the rents and profits thereof, worth four hundred dollars a year.

That said Rachel never intended to allow her land to be sold and the time for redemption to expire; that she could have made other arrangements, and, had it not been for the said promises and representations of the appellant, would have done so.

That appellant obtained a deed to the land, and after getting into possession, claimed ownership of it. The said Rachel has, since appellant obtained the deed and possession of the land, demanded that he restore to her said title and possession, and account for the rents and profits thereof, and offered to pay any difference that might be found in his favor, and that he has refused to do so, and denies her title, rights and equities, in the premises. That the said Rachel, being very aged and feeble, and unable to prosecute her claim in the premises, afterwards, and on the 7th day of April, 1875, for a valuable consideration paid and secured therefor, granted, bargained and conveyed all her interest in said land, together with any and all claim to the rents and profits thereof, and all her rights and equities growing out of the same, to the said Manning, appellee herein, who is the lawful owner and holder thereof. That at time of the said grant, bargain and conveyance, the value of the rents and profits of the said land, received by appellant, up to that time, had more than paid appellant the balance due upon the purchase thereof at said Sheriff's sale, and that the said Rachel was the owner of the land in equity and was entitled to a deed from appellant freed from any claim on his part arising out of any payment of said purchase money and interest, or of any claim in the premises whatever.—(*Printed Transcript, 1–4.*)

A demurrer to the said bill was interposed on behalf of appellant for seven different grounds.—(*Printed Transcript, 7–8.*)

The said demurrer afterwards came on for hearing before the said United States Circuit Court and was overruled.—(*Printed Transcript, 9–11.*)

The appellant thereupon answered the said bill, denying all the material allegations therein contained.—(*Printed Transcript, 11–16.*)

A general replication was, on the 1st day of November, 1877, filed on behalf of Charles Manning, the appellee.—(*Printed Transcript 16–17.*)

The case was heard, upon depositions and proofs, before the Hon. Matthew P. Deady, United States District Judge, who on the 20th day of January, 1879, rendered a decree therein in favor of the said appellee and against appellant, to the effect that appellant, within sixty days therefrom, convey the said land to the said appellee, and deliver to him the possession thereof.—(*Printed Transcript, 21–22.*)

From that decree this appeal has been taken.

The grounds relied on by the appellant so far as we have been able to ascertain, are: 1st—"That the conveyance from Rachel Dove to appellee referred to in the bill, was the assignment of a mere right of suit; and, 2d—that the appellee was not, under the allegations in the bill, and the proofs submitted at the hearing, entitled to the relief decreed in his favor."

ARGUMENT.

The first ground only goes to the jurisdiction of the court below. At least we do not think it will be contended that the transaction between Rachel Dove and the appellee, in regard to the said conveyance of her interest in the land, amounted only to an attempt to assign a claim not assignable. An injury that affects the *estate* rather than the *person* is assignable. That we understand is the true test, whether the wrong arises out of contract or tort.

Hodgman vs. *Western R. R. Corporation*, 7 How., 494, and cases there cited, especially *Comegys* vs. *Vasse*, 1 Peters, 213, *Hinkle* vs. *Wanzer*, 17 How., U. S. R. 367, 368.

The claim being assignable the appellant is compelled, we submit, to take the position that it was only a *chose in action*, and that the court could not take cognizance of the suit unless a suit might have been prosecuted in the court to enforce it by Rachel Dove, the assignor, as provided in section 11 of the judiciary act of 1789. We are not prepared to admit that the appellant can raise that question in this court. He answered the bill generally, and should be adjudged to have waived any question of that character.

Railroad Co. vs. *Harris*, 12 Wall., 84.

The court below had undoubted jurisdiction of the subject matter of the suit, and no question was raised by plea or demurrer as to the jurisdiction of the parties; no plea, in fact, was ever filed, and of the said seven grounds of demurrer, the appellant abandoned all but two of them when it was heard, viz.: 1st—That the alleged trust was void because it appeared not to have been made in writing. 2d—That at the date of the conveyance to the appellant his grantor, Rachel Dove, had no interest in the premises, and nothing to assign, except a mere right of suit which is not assignable.—(*Printed Transcript, 10.*)

It is certainly too late now to raise any question as to the object or purpose of the transfer to appellee. This would undoubtedly be true under the act of 1789; and we respectfully submit that, in view of the circumstances of this case, it is equally true under the act 1875.

And we submit that if appellant desires a review in this court of the ruling of the court below upon any question raised by his demurrer, affecting the jurisdiction of that court as to the parties, he should have stood by his demurrer.

Railroad Co. vs. *Harris, supra.*

And that every question of that character not raised by demurrer or plea, especially where the bill, upon its face, shows jurisdiction, is waived.

But we do not assent to any view that the conveyance from Rachel Dove to the appellee was the assignment of a *chose in action* within the meaning or intent of said section 11 of the judiciary act. The opinion of this court in *Deshler* vs. *Dodge*, 16 How., 622, shows the particular character of claims to which that section is made applicable. The court there says: "We are of opinion that this clause of the statue has application to the case of a suit by the assignee of a *chose in action* to recover possession of the thing in specie, or damages for its wrongful caption or detention; *and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned.*" * * * * "The principle governing the case will be found in cases that have frequently been before us, arising out of the assignment of a mortgage where it has been held, that, if the suit is brought to recover the possession of the mortgaged premises, the assignee may bring suit in the Federal courts, if a citizen of a State other than that of the tenant in possession, whether the mortgagee could have maintained it or not within this section; but if brought to enforce the payment or collection of the debt by sale of the premises, or by a decree against the mortgagor, then the assignee is disabled, unless the like suit could have been maintained by the mortgagee." Pages 632, 633 of the case.

It follows from the construction given by the court in the above case, that the Federal courts are not necessarily deprived of jurisdiction in consequence of the complainant being the assignee of a *chose in action*, when they would not have jurisdiction at the suit of the assignor; that then, it depends upon the character of the remedy invoked. That if the remedy be to recover the *thing*, those courts have jurisdiction irrespective of the place of citizenship of the assignor. In the case under consideration the suit was to recover the title and possession of the premises in controversy; not to enforce any covenant or promise of the appellant that had been assigned to the appellee. It was to have his rights in the land established by the adjudication of the court, and the title and possession of it decreed to him; nor did Rachel Dove's right to the land at the time she conveyed to appellee rest in covenant or promise, but upon the acts of appellant and circumstances of the transaction by which she was originally divested of the legal title. The nature of her interest in the land after its sale upon the execution, and the execution of the deed to appellant, was that of a beneficiary under that character of implied trusts which are independent of any presumed intention of the parties, but are forced upon the conscience of the party by operation of law—Sec. 1195, Story's Equi. Juris.—a trust arising *ex maleficio*.

And the object of the parol testimony in such case is to show, not an agreement to purchase for another, but a relation out of which grows a duty to do so.

Browne on Frauds, 2d Ed., Sec. 96.

Nor do we admit that said conveyance from Rachel Dove to appellee was the assignment of a *chose in action* at all. We contend, on the contrary, that it was the transfer of an estate, an interest in the land, that could only be transferred by the mode required in the transfer of real property generally.

"It is of the utmost importance that the trust estates of the nature of freehold should be considered in equity as perfectly analogous to legal estates of the same kind, and subject to every incident to which such legal estates are liable; consequently there should be a disseisin, abatement or intrusion allowed on a trust estate, as well as on a legal one. And this doctrine was admitted by Lord Eldon and Lord Redesdale in a late case, which will be stated hereafter." This is the language of section 4, Title 12, Chapter 2, Vol. 1, of Greenleaf's Cruise. Title trusts at section 6, same Title and Chapter, it is stated that "any disposition of a trust by the *cestui qui trust* was formerly binding on the trustee in a court of equity. But it was enacted by the statute of frauds, S. 9. that all grants and assignments of any trust or confidence shall be in writing, signed by the party granting or assigning the same, or else shall be utterly void and of non effect." In *Hughes* vs. *Moore*, 7th Cranch 176, Chief Justice Marshall, in delivering the opinion of the court, says, at page 191, "The court can perceive no distinction between the sale of land to which a man has only an equitable title and the sale of land to which he has a legal title. They are equally within the statute." In that case the trust was of the same character we have before referred to. It arose out of a fraud.

Smith vs. *Burnham*, 3 Sum., 435.

The statutes of Oregon provide that "No estate or interest in real property, other than a lease for a term of one year, nor any trust or power concerning such property, can be created, transferred or declared otherwise than by operation of law, or by a conveyance or other instrument in writing subscribed by the party creating, transferring or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

Section 771, Title 8, Chapter 8, Civil Code, General Laws of Oregon.

The term "trust estate," or "equitable estate," has a well defined signification. It is an estate that is property as much as a legal estate, and transferable by the same form and ceremony. It is a *jus in re*, and a conveyance of which is not the assignment of a right of suit, though a right of suit is transferred with it as an incident. This is the case even though the deed of transfer be voluntary.

McMahon vs. *Allen*, 35 N. Y., 403, and cases there cited.

The views here expressed were adopted by the learned District Judge who heard the case in the court below.—(*Printed Transcript 9–11.*)

The distinction there made by His Honor Judge Deady, between the conveyance of an interest in the land, and the assignment of a right of suit, was evidently arrived at without the aid of the case of *McMahon* vs. *Allen*, *supra*, yet it was fully supported by it, and is plainly recognized in the case of *Graham* vs. *Railroad Co.*, decided by this court at the October term, 1880, although the court seemed to favor the doctrine laid down in the case of *Prosser* vs. *Edwards*, 1st Young and Coll. Exch. Eq. 481, to the extent that a mere naked right to sue, unaccompanied by a conveyance of the property itself, is not assignable, a doctrine that we have no occasion to question in this case. The conveyance from Rachel Dove to appellee was by deed under her hand and seal, and executed in due form, and the fact that appellant was in possession of the property at the time, claiming the absolute ownership of it, did not affect her right to make the conveyance under the laws of the State of Oregon. Section 1, Title 1, of Chapter 6, miscellaneous laws of that State, provides, "That conveyances of lands or any estate or interest therein, may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved and recorded as directed in this title, without any other act or ceremony whatever."

Section 3 of the same title, chapter and subject, provides that "A deed of quitclaim and release of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by deed of bargain and sale;" and section 8, ib., that "no grant or conveyance of lands, or interest therein, shall be void for the reason that at the time of the execution thereof such lands shall be in the actual possession of another claiming adversely." The latter section of the statute relieves transactions relating to the sale of lands in Oregon, held adversely from the imputation of *champerty*. And as the reform code of practice, which has been adopted in that State, tolerates the assignment of things in action arising out of contract, and provides in whose name the suit shall be brought, we are not willing to acknowledge that the assignee of a mere right of suit could not not ordinarily maintain it in the courts of that State; but it is not necesary to contend for that view; it is sufficient for the purposes of this case that the transfer was "accompanied by a conveyance of the property itself," and that the right of suit is merely an incident to the title conveyed.

In our examination of the jurisdictional questions liable to arise in the case, we have not overlooked the provisions of the act of March 3d, 1875. Section 5 of that act provides:

That if, in any suit commenced in a Circuit Court, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable under the act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit, and shall make such order as to costs as shall be just; but the order of said Circuit Court dismissing said cause shall be reviewable by the Supreme Court on a writ of error or appeal, as the case may be.

It probably will be claimed by the appellant that, under this Section, it is the duty of the judge, whenever it shall appear to the satisfaction of the court that the suit does not involve a dispute or controversy properly within its jurisdiction, or that the parties thereto have been improperly or collusively joined as therein specified to proceed no further, but peremptorily, to dismiss it. We admit that that would be in accordance with the terms of Section 5.

It possibly, may be claimed that this court would review a decision of the Circuit Court in refusing to so dismiss, or remand a suit, although the section referred to, provides for an appeal only where there has been a *dismissal* or remanding of the case.

We earnestly insist that by the terms of the act of 1875, the power to dismiss causes under its provisions, is exclusively vested in the Circuit Courts, and that no appeal or review from their decisions of questions of this character will lie, save in the instances specially provided for by the act, viz.: where the Circuit Court dismisses or remands the case.

The right of appeal is one of purely statutory creation; it is given here in a particular instance; and the maxim "*Expressio unius est exclusio alterius*," applies.

Be that as it may, we do not admit that the question can be raised for the first time in this court. In other words that the attention of the court below should have been called to that fact before its action can be properly reviewed here. The record nowhere discloses any such act upon the part of the appellant. He was there trying to justify his conduct in deceiving an illiterate old woman who had confided in him as a citizen, neighbor and attorney-at-law, without in any manner questioning the right of the court to decide what his conduct had been in that behalf, and he certainly ought not now to be heard upon any question not raised there. Such a practice would be unfair to the court from which the appeal is taken. Justices of the peace in the State of New York are treated more considerately than that. Under a Statute of that State, providing that no justice of the peace should have cognizance of any action where the title to land in any wise came in question, and that if it appeared on the trial before a justice of the peace from the plaintiff's own showing that the title to lands was in question, and was disputed by the defendant, that the justice should dismiss the cause, the Supreme Court held, in *Roon* vs. *Mazuzan*, 6th Hill, 44, that it was the duty of the party to call the justice's attention specifically to the objection before he would be entitled to a dismissal. We can hardly understand how the question, as it stands, can be shaped so as to be raised here. Will appellant's counsel take the position that it appeared to the satisfaction of His Honor Judge Deady, that the appellee had been improperly or collusively made plaintiff, and that he erroneously proceeded therein after such appearance? Or, will they claim that he ought to have been "satisfied" from what appeared therein, that such was the case, and that he committed error in not being "satisfied" in that respect? The court that hears the case is the one to be "satisfied" in that particular. Satisfied from the circumstances and surroundings of the case, and if suspicious that a fraud upon the court is attempted to be practiced by bringing into it a case not properly cognizable there, it should perhaps institute an inquiry upon the subject.

The statute in question is silent as to how it shall appear that the parties have been improperly or collusively made or joined for the purpose of creating a case cognizable under the act. The act, we contend, contemplates a proceeding, if necessary, outside of the pleadings and proofs as the question may arise any time in the progress of the case, not only after the pleadings have been made up, but after publication of the depositions, but we deny that it is the duty of the court when the transaction is regular upon its face, when there has been a formal conveyance of the property in controversy to the plaintiff, to undertake upon its own motion to ascertain the secret object and purpose of the conveyance; as Judge Cowen once said from the Supreme bench of the State of New York, "to go mousing about," in order to find out whether the conveyance was in good faith or only colorable, and executed with the design merely of vesting the federal courts with the jurisdiction of the parties.

The case is here upon pretended error, either general or special; general if it involves the merit of the suit, and special if it goes only to some collateral matter. If of the latter character, it ought to appear from some special ruling of the court below.

In this case the Circuit Court would not have been justified in staying the proceeding in the suit and dismissing it, unless it appeared to the satisfaction of the court that the appellee had been improperly or collusively made plaintiff for the purpose of creating a case cognizable in that court, and we maintain that the facts and circumstances developed at the hearing did not establish any such condition of affairs as would necessarily satisfy the court, or even suggest that such was the case.

It is true that a suit had been commenced in the State Court in favor of Rachel Dove and her husband against the appellant of the same character and had been dismissed, that subsequently a conveyance of the estate, claimed by the said Rachel, was executed to the appellee, that the consideration had only been promised by appellee to her, and that he subsequently commenced the suit in the United States Court, yet all the circumstances surrounding the case can be harmonized with an absolute and honest disposition of property. Rachel Dove was old and infirm, she was not in a condition to engage in a tiresome litigation and doubtless was willing to dispose of the property upon the best terms she could. She made an absolute deed to the appellee, who was her son-in-law, in consideration of five thousand dollars, which he agreed to pay therefor. The deed divested her of all her interest in the property and created in her favor a liability against the appellee for the consideration price which she could recover in an action of assumpsit. The deed invested appellee with all the title Rachel Dove had in the property, and he was entirely free to select such proper forum as he saw fit in which to recover the estate so purchased. That the conveyance was only a sham, and the appellee a mere nominal complainant, rests in suspicion alone. There was not a particle of proof to sustain such a charge, nor was any such charge made in the Circuit Court. What learned counsel may do in this court upon that subject remains to be seen. Rachel

Dove had an undoubted right to dispose of her interest in the premises in any manner she saw fit. She had the right to sell it, or to give it away, and until it was shown that there was some secret agreement or understanding that rendered the deed inoperative, and that the transaction was designed and intended to create a case cognizable in the federal courts, by proof sufficient to satisfy the court in which it was brought, that such was the fact, it was the duty of that court to retain jurisdiction of the suit and mete out even-handed justice to the parties litigant.

We notice in the Pacific Coast Law Journal, a report of *Williams* vs. *The Township of Nottawa*, decided by this court at this term. We respectfully submit that that case, and the one at bar are not in any respect parallel, and that upon the facts in the two causes, the rulings there made, do not apply here. A brief comparison of the two cases will make this apparent. In that action it distinctly appeared from the testimony of the plaintiff himself, that he was personally the owner of only three of the bonds sued on. The other bonds were transferred to Williams for the purpose of collection with his own.

In this suit, as we have already remarked, there is an absolute conveyance of the property by deed of bargain and sale. There is no evidence *tending* to show or to *suggest* that the complainant took the conveyance in trust for Rachel Dove, or that he ever agreed, or was by her expected to re-transfer the estate to her, after its recovery.

It was competent for her to sell the land and take his promise to pay her for it, upon which promise she can maintain her action for the purchase price or may enforce her vendor's lien. Or, had she chosen so to do, she might with propriety have given the land to the husband of her daughter, preferring that he should recover and enjoy it, rather than that it should remain in the hands of a man who had fraudulently deprived her of her property. So long as the estate passed by the deed, the motives of the grantor in making the conveyance are entirely immaterial. This court has frequently held this doctrine.

McDonald vs. *Smalley*, 1 Pet., 620.

To submit this question to a crucial test, suppose Rachel Dove were permitted to institute her suit against Charles Manning, setting up a secret trust in her favor, to compel Manning to reconvey the premises in controversy to her, and that her case should be submitted to the court upon the testimony in this record relative to her transfer to Manning. Would any lawyer have the hardihood to contend that she could recover? Certainly not.

The utmost that can be claimed in this case, is that it may be *suspected* that Mrs. Dove has an interest in the lands she conveyed. In view of the testimony, such a suspicion would be merely gratuitous, but in any event, in the language of Chief Justice Marshall, in *McDonald* vs. *Smalley*, *supra*, "The court can not act upon this suspicion."

Before proceeding to discuss the testimony, we desire to call the attention ~~to~~ of this court especially to the learned and exhaustive opinion rendered by Judge Deady upon the merits (Trans. 22–36), which we present in full.

Decision in the U. S. ~~District~~ Court, Deady, J.

U. S. Circuit Court, district of Oregon, Monday, January 20, 1879.

CHARLES MANNING
vs.
BENJAMIN HAYDEN.
No. 317. Suit in equity to compel conveyance.

This suit is brought by plaintiff, a citizen of California, against the defendant, a citizen of Oregon, to compel a conveyance of certain premises situated in Polk county, containing 319 acres, and known as the south half of the Bethuel and Rachel Dove donation, the same being parts of sections 2 and 3, in township 8, south of range 4, west of the Wallamet meridian.

Substantially, the bill alleges that the premises in controversy were the property of said Rachel, the wife of said Bethuel, the same being her half of the donation aforesaid, which was made by the United States to said Bethuel and Rachel in consideration of the occupation of the same by the former as a settler, under section 4 of the donation act of September 27, 1850 (9 stat., 497), from and after December 1, 1848; that on March 2, 1859, said Bethuel borrowed $1,550 from the county aforesaid to pay the balance of a debt then due William Griswold, and upon the same date said Rachel and her husband executed a mortgage of the premises to secure the loan; that at the date of said mortgage the defendant was a practicing attorney, and was the attorney and confidential adviser of said Bethuel and Rachel in the matter of said loan and mortgage and otherwise; that the defendant, for the purpose of enabling himself to cheat and defraud said Rachel out of her donation, solicited her to execute said mortgage and assured her that he would mortgage his own home farm before she should thereby lose her property, and that by means of such solicitation and assurance she was induced to execute said mortgage; that on October 13, 1863, suit was brought to enforce the lien of said mortgage in which the defendant as attorney for the mortgagors appeared and made a defence thereto, notwithstanding which, on November 18, 1863, a decree was given in said suit to the effect that said premises should be sold as upon execution to satisfy the sum then due upon said loan—$2,050.73 in currency—together with the costs of suit, and that thereupon said premises were advertised for sale; that prior to the date of such sale the defendant informed said Rachel that he would see that the property was bid off for her benefit and would protect her rights therein, and that in consequence of such information, and relying upon the honesty and integrity of said defendant, she did not attend such sale and took no steps to secure her interest in said property; that said premises at the sale thereof were worth $4,000 in gold coin, while the defendant bid in the same in his own name for the sum of $1,225 in currency, then not worth more than $612.50 in gold coin, and afterward stated and caused said Rachel to believe that said premises "had been bid off in her name and for her benefit, and that the amount necessary for her to pay to redeem the same was the said sum of $612.50;" that relying upon such statements and the honesty of defendant as aforesaid, said Rachel, in July, 1864, paid defendant $200 in gold coin upon said bid, which he received with the understanding it should be so applied; that she and her husband continued in possession of said premises as owners, and intending to redeem the same as aforesaid, until August, 1865, when the defendant, intending and contriving to disseize the said Rachel, fraudulently procured her tenant, one O. H. Smith, to surrender the possession thereof to him, and has ever since retained the same and received the rents and profits thereof to the value of $400 a year; that but for the promises and representations of the defendant aforesaid, said Rachel could and would have made other arrangements and secured the redemption of the property for her benefit; that the defendant afterward obtained a deed to said premises as the purchaser thereof, from the Sheriff making the sale, and claims to be the owner of the same in his own right, and refuses to convey the same to the said Rachel or account to her for the rents and profits thereof; that on April 7, 1865, said Rachel being aged and infirm and unable to prosecute her claim to the premises, for a valuable consideration conveyed the same and all her claim for rents and profits to the claimant, and that at the date of such conveyance the rents and profits then received by defendant had more than paid the balance due him, and the premises were in equity the property of said Rachel, and she was entitled to a conveyance of the same from the defendant.

The defendant demurred to the bill for divers causes, but upon the argument only insisted upon two: (1) that the alleged trust not being in writing is void; and, (2) that at the date of the conveyance aforesaid to the complainant, his grantors had no interest in the premises, and nothing to assign except a mere right of suit, which is not assignable.

The court, Deady, J., overruled the demurrer, saying: "Upon the facts stated in the bill I think the plaintiff is entitled to the relief sought. After a careful consideration of the argument and authorities submitted for the defendant, my impression is, that this is not a case of mere agreement within the statue of frauds, but one of a fraud practiced by an agent or attorney upon his principal or client, whereby the former was enabled to acquire the legal title to the premises, to the prejudice and wrong of the latter. In such cases equity will redress the wrong by raising or implying a trust in favor of the injured party. The wrongdoer is held to be a trustee *ex maleficio.* (2 Lead. Cas., Eq., 708; *Baker* vs. *Whiting,* 3 Sum., 482; *Ryan* vs. *Dox,* 34 N. Y., 307.) If my impression upon this point is correct then the demurrer is not well taken upon the second one. If, notwithstanding the deed from the Sheriff to the defendant, he is only the trustee of the estate, Rachel Dove was the owner of the premises in equity and could convey the trust estate—the beneficial interest—to the complainant. (*Baker* vs. *Whiting, supra.*) And such a conveyance passes an interest in the property, and not a mere right of suit."

The defendant had leave to answer, the court saying, "It is to be understood that this opinion is expressed subject to correction on the final hearing, when the questions argued upon this demurrer may be considered in the light of the pleadings and proofs in the case."

The answer of the defendant admits that he was attorney for Rachel Dove prior to the execution of the mortgage, but denies that he acted as such attorney in the matter of this loan and mortgage, or that he advised the same, or had any knowledge or information concerning the same until long after they were made. It denies that defendant was employed by Bethuel and Rachel Dove to defend the suit to enforce the lien of the mortgage, but admits that he was so employed by Bethuel, and that to gain time for him he interposed a demurrer to the bill, which was overruled. It denies that the defendant informed or promised Rachel Dove that he would bid in the premises for her at the Sheriff's sale, or that there was any understanding to that effect, but alleges that the Doves admitted their inability to hold the land, and asked him to buy it for himself. It denies that the premises were worth $4,000 in gold coin, and alleges that they were not worth more than $1,225, without stating the kind of money. It alleges that the sale of the premises was made on March 5, 1864, after being twice delayed for want of bidders, and that the Sheriff's deed to the defendant was executed April 26, 1864. It denies any information as to the value of currency at the date of the sale, but alleges that Bethuel and Rachel Dove thereby obtained a credit on their debt to the county of $177.50, that being the amount for which the property was sold, less the costs. It denies that defendant ever gave Rachel Dove to understand that she could redeem the land by the payment of $612.50 in gold coin, or that she paid him $200 in pursuance thereof, but admits that in the summer of 1864, at the request of Bethuel Dove, he agreed with him that if he would repay the defendant the purchase money, with interest, within a year from the date of the Sheriff's sale, he would sell said Dove the premises upon those terms, and thereupon said Dove paid him $200 in gold coin upon said bargain, it being then and there further agreed between the parties that in case the balance of said purchase money was not paid within the time specified that the said $200 was to be applied as rent money for the use of said land; that within the first year said Dove occupied the premises, under said agreement, he cut and sold therefrom $400 worth of timber, and because defendant remonstrated with him for so doing, he left the place and rented the same to O. H. Smith, aforesaid, but retained the possession of thirty acres thereof, which he "cropped the second year" against the remonstrance of the defendant. It denies that the defendant procured Smith to surrender the possession of the premises to him, but alleges that he received such possession from Moses Clark, the sub-tenant of Smith, on October 31, 1865; and also that said Rachel ever demanded the possession of the premises from the defendant, or an account of the rents and profits thereof. It denies that said Rachel ever conveyed her interest in the premises to the complainant for "a valuable, or any, consideration," or that the complainant is, in good faith, the lawful owner thereof, or that since said Sheriff's sale she was ever the owner in equity or otherwise of said land, or any part thereof.

It alleges that in 1864 the premises were worth $200 a year, but that since 1865 the defendant has expended $480 in clearing and breaking 150 acres thereof, $540 for posts and plank fence, and $400 for other fencing thereon, and $300 for building a barn and repairing a dwelling thereon, since when the value of the premises has been $300 a year, and that he has paid taxes upon the property to the amount of $200; that the contract aforesaid for the sale of the premises to Bethuel Dove was not in writing, and therefore void, and that more than six years have elapsed since the expiration of said agreement.

A general replication was filed to the answer. The evidence of a number of witnesses, including that of defendant and Bethuel and Rachel Dove, was taken before the examiner and read on the hearing.

Upon the evidence, including the answer of the defendant, the following facts are satisfactorily established: That on September 18, 1874, the register and receiver of the proper land office issued a certificate, under section 7 of the act of September 27, 1850, aforesaid, from which it appears that the premises in controversy are the wife's half of the donation of Bethuel and Rachel Dove, granted to them by section 4 of the said act aforesaid, on account of the husband's settlement and occupation thereon, commencing on December 1, 1848. That for some time prior to 1858, and up to 1865, the defendant was the general attorney and trusted adviser of Bethuel and Rachel Dove, his wife; that in 1858 one William Griswold, after serious litigation, obtained a judgment against Bethuel Dove for over $8,000 in which litigation defendant acted as attorney for said Dove, and as such procured one J. B. V. Butler, also a friend and client of his, to sign an undertaking for an appeal from the judgment of said court to the Supreme Court of the Territory, by which undertaking the parties became bound to pay said judgment if affirmed, whereas said Butler at the time of signing said undertaking understood from defendant that it was for costs of the appeal only; that said judgment was affirmed and all the property of said Dove liable to execution, consisting of the north half of said donation and other lands, were sold to satisfy the same, and that in March, 1859, there was still due upon said judgment the sum of $4,000 for which said Butler was liable as a defendant therein, but which was afterwards paid by said Bethuel; that on March 2, 1859, said Bethuel and Rachel executed a mortgage upon the premises in controversy to the Treasurer of Polk county, to secure the payment of the sum of $1,550 then borrowed by said Bethuel from the school fund of said county, and payable three years thereafter, with interest at one per cent. per month, to apply upon said judgment and so far relieve said Butler from his liability thereon, and that the defendant advised said loan and mortgage and was instrumental in procuring the former and inducing said Rachel to execute said mortgage, and received some $1,000 thereof from said Bethuel and Rachel to apply upon said judgment; that after said debt became due suit was commenced by the Treasurer of the county in the Circuit Court thereof to recover the same and enforce the lien of said mortgage, to which suit said Bethuel and Rachel were parties defendant, and the defendant appeared therein as their attorney and made a defence thereto by demurrer, and on November 18, 1863, a decree was made therein that the plaintiff recover $2,052.75 and costs, and that the premises in controversy be sold as upon an execution at law to satisfy the same; that upon March 5, 1864, said premises were sold and bid in by defendant for the sum of $1,125 in currency, the sale having been twice postponed in the meantime "for want of bidders and other sufficient causes," which sale was confirmed by said court on April 26, 1864, and a deed of the premises executed by the sheriff to the defendant on the same day; that at the date of such sale the defendant was the attorney of said Bethuel and Rachel in said matter, and, moreover, in making such purchase and receiving said conveyance was acting on behalf of said Doves in pursuance of an understanding between himself and them whereby the defendant was to bid in said premises at the sale in case they went low enough, as was expected, for the benefit of said Rachel, who was to redeem the same as soon as she could, in a reasonable time, and thereby secure a home for herself and husband in their poverty and old age, and that said Bethuel and Rachel relied upon said understanding, and therefore took no other steps or means to secure the property or redeem it within the time allowed by statute, as they might and would have otherwise done, and that on July 26, 1864, said Bethuel in pursuance of said understanding paid the defendant for said Rachel $200 in gold coin, for which he gave the following acknowledgment in writing:

"Received of B. Dove two hundred dollars to be applied on purchase of land purchased by me at sheriff's sale; the land known as Mrs. Dove's half of donation land claim. July 26, 1864. (Signed) B. Hayden." But that the defendant afterward, by prohibiting said Bethuel from cutting and selling saw-logs from the premises and by procuring the tenant of the Doves—O. H. Smith, to whom the farm was rented in the fall of 1864, when Mr. Dove took up a homestead upon an island near by, where he has since lived—to pay him the rent due them, and finally in the fall of 1865 to surrender the premises to him, hindered and prevented said Bethuel and Rachel from obtaining and acquiring the money wherewith to complete said redemption as per the agreement and understanding aforesaid; that said Bethuel and Rachel are illiterate persons, not being able to read or write, and ever since the loss of the premises have been poor and without means to prosecute a suit for the same, while the defendant, by his position and influence in the county, has made it difficult, if not impossible, for them to assert their rights in the local tribunals with effect; that in September, 1874, said Rachel commenced a suit against the defendant in the Circuit Court of Polk County to recover the premises, but the same was afterward dismissed by her, and the premises, on April 7, 1875, as aforessid, conveyed to the plaintiff, her son-in-law, for a valuable consideration, with the expectation and understanding that the plaintiff would bring a suit in this court to recover the premises, and such plaintiff thereby became and now is the owner of whatever right and interest therein the Doves then had; that at the date of the purchase of the premises by the defendant March 5, 1864, the currency or U. S. legal-tenders paid by him was only worth in gold coin 65 cents on the dollar, $796.25, and that the premises were then worth not less than $2,000 in gold coin, and probably $3,000, and are now worth, exclusive of improvements, not less than$10,000; that the defendant was allowed to purchase the property for a sum so far below its real value because he was well known in the community as the attorney and friend of the Doves, and was very naturally understood to be acting in their behalf; and that the sum due the defendant in coin, on account of this transaction, on January 1, 1879, is as follows: Paid on land March 5, 1864, $796.25; interest theron at ten per centum for 14 years, 9 months and 25 days, $1,179.97; taxes paid on land, $200; present value of permanent improvements placed thereon, $1,000; total, $3,176.22: and that he is chargeable thereon as follows: Rent of premises from January 1, 1866, to January 1, 1879, 13 years, at $250 a year, $3,250; interest thereon, at rate aforesaid, $1,950; cash received July 26, 1864, $200; interest on the same, at the rate aforesaid, for 14 years and 5 months, $280.33; total, $5,680.33; balance against defendant, $2,504.11; from all of which it appears that the defendant has been long since repaid the money advanced to the Doves, and also his subsequent expenses in connection with his occupation of the premises.

The evidence is conflicting concerning some of these conclusions of fact, but the truth is generally apparent, notwithstanding. I do not propose to discuss it in detail, but there are one or two points that justify some special attention.

As to the circumstances concerning the preparation and execution of the mortgage, there is a direct conflict between the testimony of the Doves and that of the defendant and his witness, Reason R. Boothby. The contradiction can hardly be explained upon the theory of a failure of memory or an unintentional mistake, and therefore it almost necessarily involves wilful falsehood.

At the date of the transaction the defendant was living on his donation claim a few miles north of the Doves, while Boothby lived at Eola, about half way between them.

The Doves swear unqualifiedly that Hayden came to their house and prepared the mortgage there, using Ford's notes of the claim survey which they had in describing the premises, and left it with them saying he would send Boothby, a justice of the peace, down to take their acknowledgment; that Boothby came down the next day or two, when they executed and acknowledged the instrument.

On the contrary, Hayden swears both in his answer and testimony that he never wrote a line of the mortgage, and don't know who did; that he never advised it or knew anything about it until some time after the execution. Boothby testifies that he wrote the mortgage, including the names of the mortgagors thereto, Bethuel and Rachel Dove; in short, that he wrote every word of the instrument, except the names of the attesting witnesses, George Bolter and Theodore Ingalls.

The Doves, although not parties in interest, are not disinterested witnesses by any means, while the defendant is deeply interested in the result in both property and character. Boothby does not appear to be a person of any particular character or standing. During the past 20 years he appears to have lived from place to place in Oregon and Washington, for the most part east of the Cascades, and is a painter by trade.

A very satisfactory solution of this problem is furnished by an inspection and comparison of the writings on the mortgage with one another, and with that on the receipt of July 26, 1864; and also the signatures of the defendant and said Boothy to their evidence given before the examiner in this cause.

The mortgage bears upon its face indubitable evidence that Boothby's story is untrue; that he never wrote a word of the mortgage except the certificate of acknowledgment and his signature thereto as an attesting witness. In the first place Boothby's story and that of the defendant do no not agree, for while the latter says he knew nothing about the making of the mortgage, the former said he went to Dove's to attend to this business at the request of the defendant, who then furnished him with a blank form upon which to write the mortgage and prepared a description of the premises.

The mortgage is upon a printed form of a deed of bargain and sale. The body of it contains 22 lines, which are written or mostly in writing, and the certificate 6 such lines, beside the signature of Boothby. The handwriting of the body of the instrument and the certificate are both unskillful, but quite uniform and marked in character, and radically different. It is safe to say they were never written by the same person. The difference in the capital *R*'s, *B*'s, *D*'s, *P*'s, and figure *9*'s are very notable. But this is not all. In the body of the instrument the name Rachel is incorrectly spelled with an *x* in the last syllable, while in the certificate it is spelled in such syllable with an *a* only. Bethuel is spelled correctly in the body of the instrument, but in the certificate it is spelled without an *e* in the first syllable. It is also apparent that this name was first written in the certificate as B-*h*uel, and then before completion corrected into B-*th*uel, by making the loop of an *h* upon the *m* stroke or lower part of the first *h*, and thus converting the latter into a *t*. But the loop of the second *h* did not come down directly upon the *m* stroke of the first one, but at an angle, on the outside, thus leaving the process of emendation quite apparent.

The signatures of Bethuel and Rachel Dove to the mortgage were evidently written by the subscribing witness, George Bolter, who wrote a plain, bold, round hand, as unlike that in the body of the instrument or the certificate as light and darkness.

Again, the words in the condition of the mortgage, "according to the tenor and effect of a certain promis'ory note," and the words "and fifty" in the premises of the deed immediately following the words "fifteen hundred," and the word "their" in the concluding clause are in a very different writing from the rest of the instrument. They are written in a skilled hand, with different ink, and upon comparison with the indorsement in red ink on the back of the instrument, showing when and where it was recorded, appear to be the writing of Mr. Lucian Heath, the then recorder of Polk County and secretary of state elect.

The second and third of these insertions merely supply manifest omissions, while the first only formally expresses what would otherwise be implied from what was already expressed. Before this interlineation the condition read: "This conveyance is intended as a mortgage to secure the payment of the sum of *fifteen hundred and fifty* dollars," all but the words in italics being printed, and continued: Thus "the note executed by Bethuel Dove," etc., putting "the note" in apposition with "the sum of $1,560," which it represented. The interlineation "according to the tenor," etc., was placed between the words "dollars" and "note" aforesaid, and the pen drawn through "the" before the word "note."

As it does not appear that Mr. Heath was present when the mortgage was executed, it is probable that these interlineations were made by him at the county seat, Dallas, when the instrument was taken there by Dove, or other person, to obtain the money from the county treasurer, and was delivered to him to record.

Attention is called to these interlineations and insertions after the execution of the instrument, not to suggest that any wrong was committed or intended thereby, but to show the incorrectness of Boothby's testimony, who deliberately and repeatedly swore that he wrote every written word in the instrument, except the signatures of Bolter and Ingalls—the subscribing witnesses.

Neither is this all. Boothby swears in effect that he took a clean blank with him to Dove's on March 2, 1859, upon which he then and there wrote this mortgage, and it is very certain that this is not so. The mortgage reads, "This identure, made this second day of March, A. D. 1859," the words "second" and "March," and the figure "9" being in writing. But upon examination it plainly appears that in place of these words there was first written "twenty-sixth" and "February," the latter words being partially erased and the former written over and in place of them. Neither were the words "second" and "March" written by Boothby, but probably Bolter, who appears to have been the best penman that made a mark upon the paper, unless it was Heath, while the words "twenty-sixth" and "February" appear to have been written by the person who wrote the body of the instrument. The coincidences are most convincing, but one is almost demonstrative. The letter "x" in "twenty-sixth" is formed by two perpendicular curved lines with their convex sides approaching and connected by a hyphen or horizontal line, thus)-(. According to my observation, it is a very singular formation of the letter, and an almost certain mark of identification. The only other written "x" in the instrument is found in the body of it, in the word "executed," and that is made in precisely the same way.

But the fact of the alteration of the date is a very significant one. It not only tends to prove that Boothby did not write the instrument as alleged, but also that it was drafted, as the Doves testify, by some one other than Boothby before the day of its execution, only the time was four days instead of one or two as they remember it.

The instrument having been drafted on February 26th, when the parties came to execute and acknowledge it before Boothby on March 2, it would naturally occur to some one that the date ought to be corrected, and so the words "twenty-sixth" and "February" were changed to "second" and "March," but not so as to prevent the paper from revealing to the microscope, and even the naked eye, the truth of the transaction.

From these facts, and the striking similarity between the writing in the body of the mortgage and that in the receipt of July 26th, which is admitted to be the defendant's, as well as his signature to the examination, it is morally certain that the defendant wrote the mortgage as the Doves testify.

The receipt is more than five years later in time than the mortgage, but making some allowance for the careless way in which the former is written, as compared with the latter—it being necessary to write somewhat closely and small to get the matter in the spaces left in the blank—and for some freedom of hand acquired in the mean time, as well as the difference in pen, ink and paper, the writings are very like. All the peculiarities of style—and they are many and marked—observable in the one are apparent in the other. The capital *R*'s, *B*'s, *P*'s and *D*'s are very notable instances. The terminal *d*'s are uniformly made with an upward and outward curl from the *o* instead of the stem, while the initial and middle ones are just as constantly made with a stem, which is well detached from the body of the *o*, the latter being open. The figure *8* in the two writings is very singular, and "they are as like as two black-eyed peas." The *s*, the *p*'s, the words "Dove," "hundred," "land," "claim," in short, the whole face and expression of the one is exhibited in the other.

In this connection it may be also mentioned that at the taking of the evidence before the examiner, this receipt was mislaid and supposed to be lost, and counsel for the plaintiff put in a paper which he testified was a true copy. The defendant being examined afterwards in his own behalf, and while it was thought the original was lost, swore unqualifiedly that it did not contain the final words, "the land known as Mrs. Dove half of donation land claim," and that it was for $200 "to be applied on land purchased by me at sheriff sale," omitting the words in italic, "to be applied on *purchase of* land purchased by me," etc. Subsequently the receipt was found, and produced and read on the hearing.

Next, as to the agreement or understanding between the defendant and the Doves concerning the purchase and redemption of the premises. All the circumstances, and particularly the payment of the $200, and the receipt therefor, tend strongly to show that the defendant bid in the property at the sheriff's sale as the attorney and friend for the benefit of the Doves, and that they were to remain in possession and have the benefit of the use and occupation of the place to enable them to repay him the purchase money with interest; and also that the defandant after a time conceived the design—*lucri causa*—to ignore his relation and understanding with the Doves, and claim the property as his own.

The apparent excuse for this breach of faith was that these poor, old, unfortunate people would never be able to repay him, and to make sure of this he did what he could to prevent them from so doing by depriving them in the mean time of the use and possession of the property.

The defendant pretends that the agreement to redeem was made at the date of the receipt. and not before, and he did not believe, at the time, that the Doves would be able to perform it, and therefore he made the further conditions that if the redemption was not completed within a year from the date, that is, by March 5th next following, the agreement should be at an end, and the $200 then paid on it be retained by him as rent of the premises for such year. But with this statement the known and undisputed facts of the case are at variance. The receipt itself is directly opposed to it. If such was the agreement, why does it not appear in this writing, and especially why does it not contain some reference to the alleged conditions that the redemption was to be made within eight months from that date, and, if not, that the $200 then paid should be retained by the defendant as rent. The defendant is an attorney, and a person of shrewdness and experience. These provisions are altogether in his favor, and it was his interest to preserve the evidence of them. While he was writing the memorandum, a few words, more or less, would have expressed them. The Doves, according to his statement, had no rights in the premises, as against him, and so far as terms are concerned, were at his mercy. But the language actually used in the writing is also contradictory of the defendant's statement. The receipt is not simply for $200 received by the defendant on account of land then sold the Doves or then purchased back by them from him. On the contrary, it is in terms and effect for $200, to be applied on purchase of Mrs. Dove's land, theretofore purchased by the defendant at sheriff's sale. To be applied on what purchase? Why, manifestly, the purchase made at the sheriff's sale, thus suggesting distinctly what the Doves assert, that the land, though purchased at such sale by the defendant in his own name, was, in fact, purchased for them, and was in equity and good conscience their purchase. Upon no other theory of the facts can effect be given to this word "purchase" in the receipt or its use therein satisfactorily accounted for. Indeed, some such view of the matter must have suggested itself to the mind of the defendant, for he could not remember, when it was thought the receipt was lost, that it stated that the money was to be applied on the purchase of Mrs.

Dove's land claim, and swore to the best of his recollection that these words were not in the receipt; and by way of giving emphasis and weight to his testimony in this respect, swore that he had seen the receipt and scrutinized it closely since this matter was placed in the hands of counsel.

As to the value of currency at the date of the sheriff's sale, I have consulted the contemporaneous quotations of the price of gold, and find that legal-tenders were then worth, in Portland, 65 cents on the dollar, which makes the amount advanced by the defendant, in gold, $796.25, The only testimony upon this point was that of the defendant and Dove. the former stating that they were worth about 75 cents and the latter 50; but he also states, what he was more likely to remember, that the amount to be repaid the defendant was about $700 in coin.

As to the value of the property in 1864, the testimony is very conflicting, the opinions varying from $700 to $4,000 in coin. Much of it is unsatisfactory, and some of it utterly incredible, as for instance, that it was not worth more than $2 per acre. In a country where land is the foundation of society, and agriculture the chief occupation of the people, a certain amount of knowledge upon this subject is common to most persons, and in considering this question it cannot be overlooked that this property is the half of a donation claim selected in 1848, and therefore, probably choice land and favorably situated, that it lies very near the Wallamet River, within a few miles of the capital of the State; that with any kind of cultivation much of it will produce at least 20 bushels of wheat and 40 bushels of oats to an acre, one year with another, and that probably it has not since 1851 been held at a less value than $10 per acre, and under favorable circumstances might have been sold for that at most any time since. In arriving at this conclusion, weight has been given to the fact that in 1859, the property was accepted by the county treasurer of Polk County as sufficient security for $1,550, in coin, payable within three years with 12 per centum interest. From this fact it must have been valued at about $3,000, and I have no doubt but that was what it was then generally considered worth. And this shows that the inadequacy of the consideration advanced by the defendant was very marked, it being at most a little over one-third its real value, an inadequacy "so gross and manifest as to shock the conscience."

It has been suggested that the price paid, $1,225 in currency, was credited on the decree against the Doves at par, and therefore the defendant ought to be considered as having advanced that much for them in coin or its equivalent.

So far as Rachel Dove is concerned, a sufficient answer to this suggestion is found in the fact that the decree against her, so far as it was *in personam* and for money, was void. She was not indebted to the county. She did not join with her husband in the note for the loan, and if she had, being a married woman, the act would have been a nullity. (*Nor-*

ton vs. *Mader*, 4 Sawyer, 620; *Dick* vs. *Hamilton*, 1 Deady, 338.) By the mortgage she pledged her property for her husband's debt, and by its sale on the decree it was discharged from the lien.

The parties seem to have acted upon the theory that the husband had no interest in the wife's land. But this was a mistake. Bethuel Dove was seized of an estate for his life in the donation of his wife by virtue of the marriage. (*Starr* vs. *Hamilton*, 1 Deady, 372; *Wythe* vs. *Smith*, 4 Sawyer, 19.) But even as to the husband, if the defendant acted for him in making the purchase, the advantage, if any, accrued to the former and not the latter. Between them, the question is, not what effect did the payment of the currency have upon the decree, but what did it cost the defendant? What did he advance? (*McDowell* vs. *Milroy*, 69 Ill., 500.) Upon this state of facts, and leaving out of view for the present that the defendant was also the attorney of the Doves at the date of this transaction, the law implies a trust between the defendant and them. His conduct being inequitable and unjust, and involving a gross breach of the special trust and confidence reposed in him by the Doves to their serious injury and his corresponding advantage, equity will treat him as a trustee of the property thus wrongfully acquired, and hold him liable accordingly. (1 Perry on Trusts, secs. 166, 168; 2 Sto. Eq., secs. 1254, 1261, 1265; 3 Lead. Cas. Eq., 139; *Gaines* vs. *Chew*, 2 How., 649.) This is a case of constructive trust, a trust arising out of the misconduct of the defendant, and does not depend upon the existence of a writing. It is without the statute of frauds, and the facts constituting it may be shown by parol. (1 Perry on Trusts, sec. 85; 2 Sto. Eq., sec. 1531; 2 Green. Ev., sec. 266; *Jenkins* vs. *Eldridge*,. 3 Sto., 286.) This being so, there is no doubt but that the Doves had an interest in the premises at the date of their conveyance to the plaintiff. In addition to the authority cited on the hearing of the demurrer upon this point, reference is made to Perry on Trusts, sec. 227, where it is said, "The right of a party who has been defrauded of the title to his land is not a mere right of action to set the deed aside, but it is an equitable estate in the land itself, which may be sold, assigned, conveyed and devised. In the view of a court of equity, he is still the owner of the estate, subject to repay whatever money or other property he may have received from the fraudulent grantee."

But it is contended for the defendant that this suit is barred by the lapse of time; that the plaintiff, or those under whom he claims, have been guilty of laches—have slept upon their rights.

In the consideration of purely equitable rights and titles, courts of equity act in analogy to the statute of limitations, but are not bound by it. As was said in this court in *Hall* vs. *Russell* (4 Saw., 515), "When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property. So, in cases of implied or constructive trusts, when it is sought for the purpose of maintaining the remedy to force upon the defendant the character of a trustee, courts will apply the same limitation as provided for actions at law;" citing *Elmendorf* vs. *Taylor*, (10 Whea., 176;) *Miller* vs. *McIntire*, (6 Pet., 66;) *Beaubein* vs. *Beaubein*, (23 How., 207;) to which may be added *Wisner* vs. *Barnett*, (4 W. C. C., 638; *Kane* vs. *Bloodgood*, (7 John., Ch. 110,) and *Michond* vs. *Girod*, (4 How., 560.) Apply this rule to this case, and this suit may be maintained at any time within 20 years from the fall of 1865, the time when the defendant finally repudiated the arrangement with the Doves and wrongfully took possession of the premises, that being the period limited by statute for the commencement of an action at law therefor.

But where the trust is constructive and also arises out of the fraud of the defendant, there does not appear to be any fixed rule upon the subject. The matter is left to the equitable discretion of the court, to be decided in each case according to its nature and circumstances, subject to the qualification that diligence must be used to establish a trust by implication, and that equity will not aid a party to enforce such a trust when the demand is stale or where there has been long acquiescence in the wrong. (1 Perry on Trusts, sec. 228.)

Periods ranging from 50 to 17 years have been held to be a bar, and under other circumstances a delay of from 11 to 18 years has been held to be no bar. (Perry *supra*, sec. 229.) In *Michond* vs. *Girod*, (4 How, 561,) where the matter was thoroughly examined, Mr. Justice Wayne says:

"Within what time a constructive trust will be barred must depend upon the circumstances of the case. (*Boone* vs. *Chiles*, 10 Pet., 178.) There is no rule in equity which excludes the consideration of circumstances, and in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within 30 years after it has been discovered or becomes known to the party whose rights are affected by it."

This suit was commenced within eleven years, and the one in Polk County within nine years from the time the defendant took possession of the premises and disavowed the understanding and obligation under which he acquired the legal title, so that in any view of the matter there is no ground on which to rest a claim that this suit is barred by lapse of time or that the demand is stale or the wrong long acquiesced in. Indeed, considering the circumstances of the case and the unequal condition of the parties, the court would not be justified in refusing relief upon the case made, if twenty years had elapsed from the commission of the wrong.

But the decision of this case can be put upon higher and safer ground than the contracts, and understandings of the parties, which are liable to both misrepresentation and misapprehension.

If the defendant was the attorney of the Doves at the time he bid in this property, he must be considered as acting for them, and he is liable to them therefor as their trustee, unless he can show satisfactorily that he purchased for himself with his client's consent, and that the transaction was in every respect fair and not to their disadvantage. The presumption is against him and the burden of proof is upon him; and if his interest as a purchaser may conflict with his duty as an attorney, the sale will be held void or the attorney charged as a trustee, at the option of the client. This rule is alike necessary to preserve the dignity and integrity af the legal profession and to protect the interests of a dependent and confiding clientage; and in the enforcement of it courts will not hesitate because the injury to the client does not fully appear or a positive intention on the part of the attorney to gain an advantage is not shown.

This statement of the law will be found fully supported by the following authorities, some of which go even beyond it, and hold that a purchase by an attorney of the subject of litigation cannot be maintained against the client under any circumstances:

1 Perry on Trusts, sec. 166; *Case* vs. *Carrol,* 35 N. Y., 388; *Harper* vs. *Perry,* 28 Iowa, 60; 1 Sto. Eq., secs. 312–13; *Berrien* vs. *McLane,* 1 Hoff., ch. 423; *Cutts* vs. *Salmon,* 5 Eng. L. & E., 95; S. C., 12 Eng. L. & E., 317; *Ward* vs. *Carter,* 1 Eng. Eq. Cas., 26; *DeRow* vs. *Fay,* 3 ed., ch. 389; S. C., 4 ed., ch. 44; *Trotter* vs. *Smith,* 59 Ill., 244; *Howell* vs. *Baker,* 4 John, ch. 120; *Hess* vs. *Voss,* 52 Ill., 481; *Wade* vs. *Pettibone,* 11 Ohio, 60; *Nesbit* vs. *Lockman,* 34 N. Y., 169; *McDowell* vs. *Milroy,* 69 Ill., 500; *Hawley* vs. *Cramen,* 4 Cow., 730: 1 Lead, Cas. Eq., 203; *Evans* vs. *Ellis,* 5 Denio, 643; Weeks on Attorneys, sec. 273, *et seq.*

The already great length of this opinion precludes any citation from these authorities, but the following paragraph from *Case* vs. *Carroll, supra,* is so exactly in point and so sound in doctrine and clear in expression that it may be cited notwithstanding:

"It is a settled principle of equity that no person who is placed in the situation of trust or confidence in reference to the subject of the sale can be a purchaser of the property on his own account. And this principle is not confined to a particular class of persons, such as guardians, trustees, or solicitors, but it is a rule of universal application to all persons coming within its principle, which is, that no party can be permitted to purchase an interest when he has a duty to perform inconsistent with the character of a purchaser."

But it is contended that the defendant was not the attorney of the Doves at the time of the purchase. It is admitted, however, that he was the general attorney of the husband, and it is not seriously contended that he was not such attorney for the wife also, through the agency of the husband, so far as she needed one. It is also admitted that he was the husband's attorney in the foreclosure suit, and finally upon the hearing, the quibble that he was not the wife's attorney also in such suit was frankly abandoned. And this accords with the record which states unequivocally that he appeared for both, though the demurrer filed by him, or the transcript of it, states that "the above-named defendant"—in the singular—comes by B. Hayden, etc. But who is "the above-named defendant?" The reference is to the title of the cause in the beginning of the demurrer, and that reads, "J. Emmons, treas. of Polk County, vs. Bethuel and Rachel Dove, def'ts," so that if there is any ground for saying that this demurrer was made by the defendant for either of them rather than both, it is the wife, who is expressly named in full, and who was the principal party in interest. But the omission of the *s* from the word defendant in the body of the demurrer is undoubtedly a mere clerical misprision and unworthy of serious contention or further consideration.

But it is claimed that the defendant ceased to be an attorney of the Doves from and after the date of the decree of sale in the foreclosure suit, or at most at the expiration of 60 days thereafter—the time then allowed for an appeal to the supreme court.

This sale, being made in a suit in equity, was a judicial one, and so in effect are all sales made upon execution in this State—that is, it was not made absolutely, but subject to the approval of the court, which might upon the objection of the defendant set it aside if it appeared that there were "substantial irregularities in the proceedings" concerning the same, to his probable loss or injury. (Or. Civ. Code, secs, 293, 413). If, then, the relation between the defendant and the Doves of attorney and client had not ceased before this sale, the defendant could not become a purchaser thereat on his own account without raising a conflict between his duty and his interest. It was his duty to examine the circumstances of this sale, and if he found good cause, to object to its confirmation. The property was sold for not more than one-third its value. There is satisfactory testimony in the case that a neighbor intended to make the property bring at least the amount of the decree and costs, but learning that the defendant was going to bid for Mrs. Dove, and having sympathy for her, he generously forbore. But this was an irregularity which ought to have avoided the sale. The loss was a direct injury to Dove, who was left personally liable for so much of the decree as the sale of property ought to have satisfied but did not. But the defendant, as he was situated, could not or would not bring this matter before the court, because if he purchased for Dove, as was the understanding, his clients were satisfied, while if he purchased for himself, as he now claims, his interest would prevent it.

How or why the defendant ceased to be the attorney of the Doves before this sale is not shown, nor can it be. It is not claimed that there was any change of attorney or any agreement or understanding that his services were to stop short of the final determination of the matter, which was not the mere entry of the order of sale, but the final confirmation.

By the law of this State an attorney has authority to bind his client in any of the proceedings in a suit by an agreement. (Civ. Code, sec. 1007.) And he may be changed before the final determination thereof by consent, of record, or the order of the court. (Id. sec. 1010.)

As has been shown, the final determination of the proceeding in question was the order confirming the sale. It is not pretended that there was any change of the attorney between the order and confirmation of sale, as provided by statute or anywise.

Still it is insisted that in some undefined and occult way the defendant dropped out of the case before the sale, and was thereafter a stranger to the proceeding. Suppose the defendant had not purchased and had signed a stipulation consenting to a resale or had appeared in court and objected to the sale, would it have been necessary to enter his appearance anew as upon a first retainer, or would the court or opposing counsel have presumed or thought of asking for his authority to appear in the proceeding for the confirmation of the sale, in the suit in which he had appeared and acted as the defendant's attorney in the preparation and hearing of the cause?

It seems to me that the matter is too plain for argument. The defendant was the attorney of the Doves when he made the purchase, and in so doing, if he purchased for himself, as he now claims, he put his duty to them in conflict with his interest as such purchaser, to the manifest injury of his clients, and therefore they have a right to treat the sale as void, or to hold him to account as their trustee. If, on the other hand, he purchased it for them, as I find from the evidence he did, then of course he is their agent and trustee, and bound to account to them as such.

The conclusions here stated have not been lightly or hastily reached. But they are the result of a thorough examination of the case, and a full and careful consideration of the questions involved in it, after able and instructive arguments by the learned counsel who appeared for the parties—particularly for the defendant. I now announce them with reasonable confidence in their conformity to the law and justice of the case, and with the comfortable assurance that if they are otherwise, the defendant can appeal to so exalted a tribunal as the Supreme Court of the United States for their correction.

The decree of this court will be, that the defendant, within sixty days, convey the premises to the plaintiff by a good and sufficient deed, with proper covenants against his own acts, to be prepared and settled before the master of this court, and at the same time deliver possession of the premises, and that defendant within the same time pay plaintiff his costs in this suit expended, and that in default thereof execution issue therefor.

MATTHEW P. DEADY,
U. S. District Judge.

ANALYSIS OF THE TESTIMONY.

WAS THE CONVEYANCE TO CHAS. MANNING IN GOOD FAITH?

As we have already stated, this question was not urged on the trial of the cause below, counsel for the defendant there confining themselves to the propositions that only a mere right of suit had been conveyed, which they claimed was not assignable, and that the alleged trust was void, because it did not appear to have been in writing.

The testimony on the subject of the *bona fides* of the conveyance is very meager, but we submit that a careful examination of it discloses nothing which can raise a legitimate suspicion that the appellee holds the lands in trust for his grantors, or in other words, that the estate of the Doves in the granted premises did not pass.

The deed, of bargain and sale, recites a consideration of $5,000.

It is under seal, which imports a consideration. (*Transcript, 112*).

Rachel Dove, in answer to question 5, (*top of page 60, Transcript*), says :

" Manning has never paid me any money on this land, but he was going to. He never gave me his note. I can't say when I saw Manning last; I think eight years ago. Manning wrote first about having the land conveyed to him ; said he would take the matter off our hands."

B. Dove, in answer to cross question 1 (*Transcript, 69*), speaking of the consideration, says: " I don't know whether it has been paid or not. I don't know from my wife whether any of it has been paid or not."

In his re-direct examination (*Transcript, 70*), he says:

"It was intended by that deed to convey to Manning the south half of the donation claim, or the wife's half."

Elizabeth Manning, in answer to cross question 16, as to whether her husband knew there was a dispute in reference to the land when her husband bought it, says:

"My husband did know it."

This is all the testimony in reference to the subject.

Is there, in this record, anything tending to show that Rachel Dove's estate in the lands did not pass to her grantee?

Has she any remedy against her grantee except to enforce a vendor's lien, or her action in assumpsit, should he fail to pay her for her lands?

In discussing the law of the case, we think it is conclusively shown that the motives which actuated the grantors in making the conveyance, were entirely immaterial, provided their conveyance passed their estate in the land.

This we conceive to be the rule in the light of the decisions of this court.

There is nothing in the record to take this case out of the rule.

HAYDEN WAS THE ATTORNEY OF THE DOVES.

The learned Judge who tried the case below, found, as a conclusion of fact, "That at the date of such sale (referring to the sale under which Hayden claims) the defendant was the attorney of said Bethuel and Rachel Dove in said matter."

The correctness of this conclusion was not seriously controverted on the trial in the Circuit Court, and in view of the facts and circumstances of the case, we do not see how it can be here.

In the first place, Hayden had been Dove's attorney in an important litigation which he had with one Griswold some two years before this transaction. It is admitted that he had drawn papers for Mr. Dove, who, as well as his wife, was illiterate, and therefore compelled to rely implicitly upon the good faith and integrity of his legal adviser.

Mrs. Manning (*Transcript, 43*), testifies that Hayden was her mother's attorney in 1864. She says she heard a conversation between him and her mother in June or July, 1864, in regard to her land, and money matters connected with it.

That her mother told him she had some money to pay on her land. He replied that he was glad of it, etc. She says, in answer to Int. 16, "Mother told Hayden at that time that if he had not promised her that she should have her land back again, she would have never signed her right away. Hayden said the land had been her's, and should be again, and that all he wanted was his money back with interest."

She also testifies that Hayden was her mother's attorney in the foreclosure suit in question, under which he claims.

To the same general effect is the testimony of E. P. Dove, who says that Hayden told him (referring to the sale of her lands), to tell his mother not to be uneasy, that he had left a man to bid off the place for her. (*Transcript, 54 and 55.*)

Mrs. Rachel Dove's testimony, (*pages 58 and 59, transcript*), shows the confidential relations existing between this country lawyer and his unlearned and too-confiding client. She says "he did all our business—the writing and law business." That he wrote the mortgage in question in her house, and told her if she would sign it, "he would see that she didn't lose her place; that he would mortgage his own first."

Her statement that she believed his representations,(*Transcript, 58*), in view of the after treatment she received at the hands of this designing man, furnishes a key to his conduct in the matter.

With him it was evidently a case of the "survival of the fittest." This poor old woman owned some land which he coveted. Taking advantage at once of her ignorance, her husband's necessities, and their mutual trust in him as a neighbor, a friend, and their lawyer, he skillfully wove his plot to entrap them in the meshes of the law, that he might wrest from her the generous donation which the government had made to an early pioneer. How well he succeeded, the record shows.

Without setting forth her testimony in full, we bespeak for it the careful consideration of the court. (*Pages 58 and 59, Transcript.*) Her story, replete with the simplicity of truth, limns his charactar in shadows of depravity, which are unrelieved by any eulogiums on the part of his counsel.

B. Dove testifies: "Mr. Hayden and I both persuaded the old woman (I mean Mrs. Dove) to sign the mortgage. I heard the talk between my wife and Mr. Hayden. He said she shouldn't lose her land, that he would mortgage his own place before he would see her lose her place. Mr. Hayden drew the mortgage; he drew it at my house. Mr. Hayden was my attorney at the time. My wife knew he was my attorney. He attended to my suit with Griswold and other business. He acted as my attorney in the foreclosure of the mortgage. I considered he was acting as attorney for her. Saw him at court and he said he was going to attend to the suit (foreclosure of the mortgage) whether I got home or not. I had been up North. He answered these by a demurrer. It was overruled; judgment went against us. I took him the $200 my wife sent him, and gave it to him in payment on the place to pay his money back. He gave me a receipt."—(*Answers 3 and 5, Transcript, 62*).

"Hayden and I had hard coaxing to get my wife to sign the mortgage. Could have paid him his money all back, but he would not let me get a loan on the place, nor cut logs."

"Had a talk with Hayden about defending the suit (the mortgage foreclosure). He said we might put in a defense. I told him the complaint wasn't good, because I signed the mortgage first, it being her land. He said he had a better defence than that, and put in a demurrer."—(*Answer 3, Transcript, 66.*)

Mordecai Kennedy testifies: Had conversations with Hayden in 1863, 1864 and 1865 about that land claim, and about the business generally. Defendant told me he was attending to their business, (the Doves') for them. He told me that he had bid in the land, or got some one to do it, so the old folks could have the land, or a chance to redeem it.—(*Transcript, 68.*)

G. W. Lawson says: As attorney for Mrs. Dove, I made demand of the land of Mr. Hayden in 1874; made a written demand. Hayden said it made no difference about his being her attorney, he had a good right to bid off the land because it was put up at public sale. Said that he had given her a right to redeem and she didn't do it; offered her two sorrel horses for her quit claim deed. Saw her at his request, and she refused. (*Transcript, 70.*)

A copy of the written demand is in evidence.—(*Transcript, 112.*)

P. C. Sullivan testifies: That as attorney for Dove, or his wife, or both, he saw Hayden about said land claim. Hayden told him that he was acting about that time as attorney for Mrs. Dove, and that he agreed to bid off the land and give her a reasonable time to refund the money, also said that the two hundred dollar receipt was for money paid by Mrs. Dove to redeem the land.(—*Transcript, 72.*)

In his answer to Mrs. Dove's bill in the State Court, Mr. Hayden admits his attorneyship for Mrs. Dove, in the foreclosure suit in question. He there said that after the decree had been entered in that suit, his duties had been performed, "and he ceased to be the attorney of the said plaintiff, or her husband."—(*Transcript, 117.*)

Mr. Hayden has seen fit to deny that he had any connection with the preparation of the mortgage of Mrs. Dove's land, to satisfy which it was afterwards sold.—(*Transcript, 95.*)

Presumably he did this to avoid the inference that he was acting as her attorney at the time, and to substantiate his direct statement that he was not her attorney. To sustain himself, he calls to the stand one who, in the main, seems to have been a swift and willing witness, one Reason R. Boothby.

He says (*Transcript, 77*) that Mr. Hayden gave him the blank on which *he* wrote the mortgage, thus inadvertently admitting Mr. Hayden's connection with the matter, while he attempts to screen Hayden by saying that he (Boothby) wrote the mortgage.

In this connection we respectfully ask the court to examine the original mortgage, along with the original receipt sent up with the record, which receipt is admitted by Mr. Hayden to be in his hand writing.

We confidently submit that such examination will satisfy this court that the learned Circuit Judge's criticism of the testimony of the witnessess, Hayden and Boothby, as illustrated by these specimens of hand writing, was just rather than severe.

But in addition to the oral testimony, which we contend conclusively establishes the fact of Hayden's attorneyship in the matter, we have a document in Mr. Hayden's hand writing by which he should be judged.

We refer to the demurrer filed by Hayden in the foreclosure suit (*Transcript, 129*), which taken with the decree of the court in that suit (*Transcript, 130*), indubitably shows that Hayden was the attorney of both the Doves. And once shown to be their attorney in the matter, he must be presumed to have remained such, in the absence of any satisfactory proof to the contrary, until the sale was made and confirmed.

There are two views of the case, in either of which the appellant was liable to be adjudged a trustee of the legal title to the real property in controversy.

1. If he undertook and promised, as charged in the bill, and, as we think, was clearly established by the proof, to bid off the property at the sheriff's sale, for Rachel Dove, his failure to do so, and his purchase of it in his own name, would render him liable as stated, whatever his relations were to her at the time, even if those of a stranger. That view would bring the case directly within the principle of *Ryan et al* vs. *Dox*, (34 New York, 307.) And

2. If, when the appellant bid off the real property, the relation of attorney and client existed between him and Rachel Dove, he was so liable, whether he undertook or promised expressly to bid it off for her or not. It is an elementary principle that where a person, standing in a fiduciary relation to another, avils himself of his position to get the legal title to himself, he will be held a trustee. We insist that this principle extends to an attorney employed in the defense of a suit in which judgment has been given against his client, and the property of the client sold upon the execution; that the attorney in such case has assumed a duty to protect the interest of the client, which continues until all the consequences of the suit are terminated; that his relations to his client are not severed when judgment is given against the client, any more than they would be if given in his favor. Public policy condemns any other rule. That an attorney, because his client has been unsuccessful in the litigation, can absolve his relations and duty to the client, and become a purchaser in his own name of the client's property, when sold upon the execution, at an inadequate price, is a strange doctrine indeed!

The attorney, by his employment, is put in the place of the client to manage his matters of law, and his duty, we contend, extends beyond the mere preparing of the pleadings and the making of a speech in court. Nor does it stop when the judgment of the court is pronounced, unless limited by the express terms of the employment. The taxing of costs, the regularity of the process which carries the judgment into effect, and of the proceedings of sale of the client's property, and the confirmation of the sale, involve matters of law often as important as the proceedings previously had. We do not contend that such purchase is *ipso facto* void, but we insist that it is the right of the client to claim the benefit of it. Any other conclusion upon the subject would open the door to fraud and afford a protection to rascality. A crafty and designing attorney could learn the condition of his client's affairs through that confidence which the relation unavoidably creates, and abuse it to promote his own interest. He could lure him into security through indirect means that the law could never reach, and by artful management, succeed to his estate. A court of equity would come far short of its mission, should it countenance any such prerogative in favor of those who make the profession of the law a business. Honest attorneys do not claim any privilege of that character, and those who are otherwise deserve restraint of the most stringent quality. The attorney who bids in the property of his client under such circumstances, should be compelled to show, in a controversy with his client respecting his right to it, that the transaction was wholly free from any suspicion of bad faith; that it was an honest affair, and that no advantage whatever had been sought or secured in his favor, else it should not be upheld. This would be a just and equitable rule, and we believe it to be the law upon that subject.

Baker vs. *Humphrey*, 11 Otto 501.

The relations of attorney and client are necessarily of the closest and most intimate nature. To the lawyer is confided the anxieties, the frailties, the mistakes, the doubts, fears and hopes of persons in all classes of society and stations in life. The law respects this necessary confidence, and makes such communications privileged, while a just public opinion, in indignantly denouncing any abuse of this confidence, affords a sanction stronger than legal penalties.

Every lawyer of any standing and practice, has noticed how easy a matter it is to influence the actions, and mold the wills of those who confide in and depend upon him. With pride let it be said that these grave responsibilities in most instances are honorably discharged by the bar.

Yet it is the disgrace of a noble profession that some unworthy ones wear its name.

No stronger illustration of simple trust, rewarded by base betrayal, can be found, to "point the moral or adorn a tale," than is furnished by the history of the case at bar.

HAYDEN'S RECEIPT.

Mr. Hayden's tergiversations in reference to this receipt are worthy of notice.

In his sworn answer to the bill filed against him in the State Court by Mrs. Dove, (*Transcript, 118*) he says:

"And this defendant admits that he recived the $200 mentioned in the said complaint, but he says that the same was paid to and received by him from the said plaintiff and her said husband as rent for the use and occupancy aforesaid of said land, and—no other account and for no other purpose."

During the time the testimony was being taken in this cause, the receipt given by Mr. Hayden to Dove (*Transcript, 122*) was lost or mislaid. The fact was shown before the examiner, and its contents were proved by G. W. Lawson, Esq., who had a copy of it, and by Mr. P. C. Sullivan.

Mr. Hayden made a furious attack on Mr. Sullivan's reputation for veracity, and then supposing the receipt would never be seen again, went on the stand and denied unqualifiedly that it contained the final words, "The land known as Mrs. Dove's half of donation land claim," as well as certain other very important words.

He then attempted to set forth his version of the matter, to the effect that he had given Mrs. Dove a right to redeem the land within a year, failing to do which, the money should be applied as rent for that time.—(*Transcript, 97.*)

Thus, it will be seen, he conveniently ignored the true receipt, as well as his statements in the answer which we have quoted. Through a singular defect of memory, he was wrong in each instance.

Shortly before the hearing, the original receipt was found, and was introduced at the trial. It reads as follows:

"Received of B. Dove two hundred dollars to be applied on purchase of land purchased by me at Sheriff's sale. The land known as Mrs. Dove's half of donation land claim.

"July 26, 1864, B. HAYDEN."

—(*Transcript, 122.*)

The remarks made by the learned court below, upon the circumstances attending this receipt and evidenced by it, are so just and aptly expressed, that we forbear comment.

It might be remarked in passing, that the discovery of the original receipt rendered the testimony as to its contents unnecessary, and the depositions of Mr. Durham showing its loss, and of Messrs. Lawson and Sullivan showing its contents, were not read on the trial below. Mr. Sullivan finds his justification against the attack made upon him, in the fact that the discovery of the lost receipt proved both his memory and veractity not at fault in this instance at least.

There is some conflict of testimony as to the value of the lands. When the mortgage was made to the school fund the County Treasurer, charged with the duty of making loans of that fund, accepted the premises as security for $1,550, a circumstance which is entitled to consideration.

There are other contradictions in the testimony, but we submit that the conclusions of the able and impartial Judge who tried the case below, are sustained by the preponderance of evidence, and must commend themselves to the judgment and conscience of this court.

In sifting this evidence, we beg to suggest that great weight should be given to the conclusions of the Circuit Judge.

His long experience on the bench of the courts of the State and the United States, in Oregon; his acquaintance for years with the parties and witnesses who figure in the case; his intimate knowledge of the history of the country and its settlers, and his conceded learning and ability, pre-eminently fitted him for the discharge of his duties. That he has carefully, fearlessly and faithfully performed them in this case, will be the conviction of every impartial mind, after a thorough examination of this record.

Since the foregoing brief was prepared, the brief of appellant has been furnished us, and we deem it proper to give it a passing notice. We shall not attempt to comment on the various arguments therein set forth as it would occupy too much time and space. Many of the arguments adduced will not be controverted. The effect of an answer in equity, as to its being in the nature of proof and requiring two witnesses to overcome it, or one witness, and strong corroborating circumstances, is a very ancient rule which we shall not attempt to overthrow, nor shall we endeavor to enlighten the court upon the law of evidence as to the proof of fraud. We are, however, somewhat surprised at the position of appellant's counsel, that Dove and wife were with equal terms with appellant in the transaction relating to the sale of the mortgaged property and appellant's purchase of it. Any one who has practiced law a dozen years will readily appreciate the entire helplessness of clients in the hands of their attorneys. The relation creates a confidence that is unbounded. The suggestion that those old people relied upon their own judgment in that transaction and did not depend upon the advice and assurances of appellant, is highly incredible, to say the least. It was most natural that they should confide in appellant. The proceeding was of such a character that they could do nothing except by his direction, or that of some other person having a knowledge of legal forms and requirements. But appellant's counsel say that appellant's undertaking to manage Dove's affairs at law had already terminated when the sale upon the execution was had. If that were so it was only in consequence of a technical rule of law, as there is no pretense that appellant's employment was limited as to time or occurrences in the progress of the litigation, by any express understanding, and if we were to admit that the law upon that subject is as appellant's counsel seem to claim, it would not change the merits of the case. Rachel Dove did not understand that appellant's employment ceased with the rendition of the decree. Her confidence in him continued the same as before, and she expected, and he must have known that she expected, that he would guard and protect her interest in the property then in jeopardy, with the same fidelity after the decree was given as he was obligated to before it was rendered. Such is the general understanding between attorney and client, and it is very reasonable to presume that she so understood it. The reason of the rule that an attorney can take no advantage of his client in reference to the subject matter of the litigation is, that confidence is reposed by the latter in the former, a confidence created by the relation. Now, if the relation is suposed by the client to continue, the attorney doing nothing to disabuse his mind upon the subject, would not the same confidence be likely to continue whatever might be the rule of law as to the time of the termination of the relation? We submit that attorneys themselves recognize no rule of law that terminates their employment when judgment is given in the case. It would be an anomaly certainly to find an honest, faithful attorney quitting his client in his adversity and assuming at that juncture the right to oppress and plunder him. Such, we contend, is not the law nor the practice of honest men. We have already expressed our views as to the right of the attorney to buy property sold under an execution.

The rule referred to by appellant's counsel. "that the solicitor of a plaintiff out of whose hands the property is entirely taken by act of law as upon a sale by execution, is not debarred from purchasing the property under execution," can have no aplication to the case at bar. The sale of property upon execution in Oregon does not take it out of the hands of the solicitor. Such sale does not, even after the confirmation, transfer the title; nothing less than the execution of the sheriff's deed, which is not until after the time of redemption has expired, accomplishes that result. The purchaser is entitled to the possession, but on redemption is obliged to restore it and becomes liable for the use of the property during the continuance of the possession.

Cartwright vs. *Savage*, 5 Oregon, 397.

Semple vs. *Bank of British Columbia*,, 5 Saw., 99.

The statute of frauds has no application whatever to the case. That statute does not extend to trusts arising by operation of law. Implied or resulting trusts are not included in the provisions of the statute, but are expressly excepted out of the Oregon statute upon that subject. (See clause of statute set out on page 8 of brief.) If the obligation upon the part of appellant to convey the land to Rachel Dove rested only in promise, the statute of frauds would undoubtedly require that the promise should be evidenced by some writing, but that is not this case. Here, the trust arises by operation of law. It is forced upon the conscience of the party to prevent fraud. It is one of the means the law employs to ensure justice between man and man.

The proposition, in appellant's brief, that the parties had slept upon their rights, in our judgment, is far fetched. The statute of limitations, as provided by the laws of Oregon, if applicable at all in such a case, had not run when this suit was commenced. Section 378, Civil Code, found in the general laws of that State, provides that "a suit shall only be commenced within the time limited to commence an action, as provided in title 2 of chapter 1, of this code; and a suit for the determination of any right or claim to, or interest in, real property, shall be deemed within the limitation provided for actions for the recovery of the possession of real property." Title 2 of chapter 1 of the Civil Code above referred to, provides that, "Actions at law shall only be commenced within the periods prescribed in this title, after the cause of action shall have accrued; except where, in special cases, a different limitation is prescribed by statute." (See section 3 of said title). Sec. 4.—" The periods prescribed in the preceding section for the commencement of actions shall be as follows: Within twenty years:—

First.—Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery, unless it appears that the plaintiff, his ancestor predecessor or grantor, was seized or possessed of the premises in question within twenty years before the commencement of the action." The above statutes, at the time of the commencement of this suit, were in force, and while they positively limited the period in which a suit should be commenced, they impliedly gave the party the full time therein limited in which to commence it. Could the claim be regarded as stale before the period of limitation had expired, especially when the statute, negatively at least, gave the full period in which to commence the suit? Upon what principle of natural equity can appellant claim to hold the property upon any such ground? Because he had been in receipt of the rents and profits of it for ten or twelve years under a possession he obtained by circumvention, and which he maintained in consequence of the impotency of the old people to wrest it from him, does it follow that he should hold it for all time? There are cases, undoubtedly, in which the question of acquiescence would have an important bearing, but there was no acquiescence in this case that appellant can complain of. If he bid in the property at the sheriff's sale for the benefit of Rachel Dove, and agreed that she might redeem it, and she paid him a part of the redemption money, and he then wrongfully induced her tenant to attorn to him, and thereby deprived her of her possession, and the means of obtaining the balance of the money with which to redeem, in accordance with their arrangement, what right has he to charge her with *laches;* to charge her with that which his own oppressive conduct had occasioned? We admit that there was no concealment on the part of appellant after he received the two hundred dollars and obtained possession of the land by his combination with her tenant. We concede that he then unmasked, and assumed an open high handed and defiant attitude, and from his position in the community and through the poverty and weakness of the Dove family, remained for some time master of the situation, but justice, notwithstanding the tardiness of its pace, finally overtook him, and has evidently caused him grievious calamity. "The mills of the gods grind slowly," but they are very thorough in their operation.

We pass over the criticism of appellant's counsel upon that part of the opinion of His Honor Judge Deady, relating to the hand writing question. We have not recently inspected the mortgage and are willing to leave it to the court to determine the fact upon that point. We do not regard that question as decisive of the case by any means, and have no idea that His Honor, the Judge, who presided at the hearing, attached any such importance to it. It was only a circumstance in the case, and was probably so regarded by the court below. Counsel for appellant have discovered some apparent discrepancies in the testimony of the witnesses for the appellee, which we shall not attempt to reconcile in our reply to their brief. Such things occur in almost every litigation, especially where a long time has intervened between the occurrence of the transactions and the time of giving the testimony. A critical examination of appellant's testimony will show that charges of that character come with an ill grace from his counsel.

In regard to the subject of appellant's bidding off the property for Rachel Dove, the witnesses may be certain and confident that such was the fact, yet when they undertake to state the time appellant agreed to do it, they may be unable to fix the correct date, or the circumstances even, when it took place. In such matters the surroundings of the affair must be observed, and the reasonableness of their testimony considered. The property was important to the Dove family, it belonging to Rachel in her own right. It was their home; had been mortgaged when Rachel Dove was under no obligation, legal or moral, to mortgage it. The mortgage had been foreclosed; the appellant was an attorney living in the vicinity, had been attorney for Bethuel Dove in former litigation, had appeared as attorney for Bethuel and Rachel in the foreclosure suit, and interposed a demurrer in the case. The sale of the property, if not redeemed, would deprive the family of a home, would strip them of property they had taken as a donation claim, and reclaimed from a wilderness. Would they not naturally look to some friend for assistance in such an emergency? And upon whom would they be more likely to call than upon the appellant, their attorney?

In due time the sale takes place, and appellant bids in the property for a very small proportion of its value. In view of these several matters, upon which there is little, if any controversy, for whose benefit would the learned counsel for the appellant, or any fair-minded person, suppose that bid was made? Could they doubt for a moment that it was for these old pioneer people? Can appellant, when he considers what his relations to these parties were at the time of the sale, and his obligations to them as a friend and neighbor, living as they were in a frontier settlement in which greed and avarice had gained no foothold, say without a blush of shame that he made the purchase for purposes of speculation? The sale was had March 5, 1864, and on the 26th day of July, same year, the receipt of the two hundred dollars was acknowledged. A writing which says, "Received of B. Dove, two hundred dollars, to be applied on purchase of land purchased by me at sheriff's sale, the land known as Mrs. Dove's half of donation land claim," was delivered to Dove under the sign manual of appellant. Does this not tend still further to corroborate the appellee's theory of the case, whatever reasonable construction is placed upon it? Admit that the word "purchase" in the writing referred to a purchase by Dove from appellant, and then it raises a strong probability that the land was bid off in the interest of the Dove family. It was only four months and twenty-one days after the sale, a part of which time the statutory right of redemption existed. Would such a bargain have been likely to have been made, had there been no original understanding between the parties upon the subject? But the writing cannot be interpreted to mean that. It obviously means that the money was paid to apply on appellant's purchase, and the ambiguity arises in consequence of the insertion of the word "purchased." With that word left out, (and it was evidently employed as a repetition of the "purchase") the writing is plain. In that case it would read "to be applied on purchase of land by me at sheriff's sale," &c. It is not at all likely that the writing applied to an arrangement between the parties made after the sheriff's sale. It would not fit any subsequent bargain between them. Something would have cropped out, showing the fact. The writing in that case would very probably have contained the words, "to be applied on purchase of land *from me* which *I* purchased," &c. The words used in the writing are not consistent with appellant's testimony, of his borrowing $650 from Butler, and that a short time before the 26th of July, 1864, he made a verbal contract with Bethuel Dove, whereby he agreed with him that if he would pay him the amount of purchase money, $1250, with interest, within a year's time, $650 of which (the amount appellant was owing Butler) to be paid at once, or soon, that appellant would, upon such payments, sell the land to him, and that the $200 was paid, and the writing given under that arrangement. The writing comes far short of expressing anything of that kind, or even a trace of it, and it is highly improbable that it ever had any connection with any such arrangement. If it had, there would certainly have been language in the writing that would have tended to show some of the features of the arrangement. Said sum of two hundred dollars was evidently paid upon some general understanding between the parties. The writing clearly indicates that, and is in full harmony with the claim of the appellee upon that point. If we are correct in that view then all the discrepancies, inconsistencies and absurdities that the learned and ingenious counsel for the appellant have discovered in the testimony of the witnesses for the appellee, amount to nothing, as they are corroborated by infallible proof. The writing speaks the truth, and if interpreted, as suggested, establishes the fact beyond contradiction, that appellant bid off the property as alleged in the bill.

Upon the question of the credibility of the witnesses, and regarding the value of the property in suit at the time of the sheriff's sale, we do not deem it necessary to reply to the arguments of the appellant's counsel. His Honor Judge Deady was well qualified to determine both of those questions. He was doubtless well acquainted with the witnesses whose character and veracity were brought in question, and was well acquainted with the price of land in Oregon at the time the sale took place. His Honor's judgment upon both of those questions under the evidence, would be far superior to that of a stranger, whatever his other qualifications might be.

Respectfully submitted,

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